No. 596

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United States Court of Appeals
FOR THE EIGHTH CIRCUIT.

No. 15,582.
CRIMINAL.

JOSEPH MARY EBELING, and
CHARLES G. EMERLING,
APPELLANTS,

vs.

UNITED STATES OF AMERICA,
APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI.

United States Court of Appeals
FOR THE EIGHTH CIRCUIT.

No. 15,582.
CRIMINAL.

JOSEPH MARY EBELING, and
CHARLES G. EMERLING,
APPELLANTS,

vs.

UNITED STATES OF AMERICA,
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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI.

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United States District Court,
Eastern District of Missouri,
Eastern Division.

United States of America, Plaintiff, v. Joseph Mary Ebeling and Charles G. Emerling, Defendants.	No. 28,379 (2).

Indictment.

(Filed Oct. 12, 1955.)

The Grand Jury charges:

1. That at all times hereinafter mentioned, Production Engineering and Manufacturing Company, hereinafter referred to as PEMCO, was a corporation engaged in manufacturing and more particularly engaged in the performance of a certain contract dated May 31, 1951, for the manufacture of mortar conversion kits, for the Department of the Army, Ordnance, a department and branch of the United States Government; defendant Charles G. Emerling was president of the said corporation; Manchester Machine Company, hereinafter referred to as Manchester, was the trade name of a manufacturing business under the management of defendant Joseph Mary Ebeling. Payments by the United States to the PEMCO pursuant to said contract were subject to repricing, and such repricing was within the jurisdiction of the Department of the Army, Ordnance.

2. Commencing on or about the 17th day of March, 1952, and continuing up to and including the date of the return of this indictment, within the Eastern Division of the Eastern District of Missouri, the defendants

Joseph Mary Ebeling, and
Charles G. Emerling

did Willfully, Feloniously, Wrongfully and Unlawfully make and use a false writing knowing the same to contain false, fictitious and fraudulent statements and entries, in

a matter within the jurisdiction of the Department of the Army, Ordnance, a Department and Agency of the United States.

3. Said false writing was an invoice dated March 17, 1952, issued by Manchester for purported charges in the sum of $3,502.00, for machine shop operations on the housing of said mortar conversion kits, pursuant to a purchase order issued by PEMCO to Manchester and dated April 16, 1952. In truth and in fact the work described in said purchase order and said invoice was not performed either in whole or in part, and each and every statement and entry in said invoice was false, fictitious and fraudulent. Said invoice was furnished by defendant Ebeling to defendant Emerling and became the basis of a portion of costs contained in a statement presented by PEMCO to the Department of the Army, Ordnance, on or about January 6, 1953, for the purpose of repricing.

In violation of Section 1001, Title 18, United States Code.

F nm 10,000 or I nm 5 y or b

Second Count.

1. The Grand Jury realleges all of the allegations contained in paragraph numbered "1" of the first count of this indictment.

2. Commencing on or about the 10th day of April, 1952, and continuing up to and including the date of the return of this indictment, within the Eastern Division of the Eastern District of Missouri, the defendants

Joseph Mary Ebeling, and
Charles G. Emerling

did Willfully, Feloniously, Wrongfully and Unlawfully make and use a false writing knowing the same to contain false, fictitious and fraudulent statements and entries, in a matter within the jurisdiction of the Department of the Army, Ordnance, a Department and Agency of the United States.

3. Said false writing was an invoice dated April 10, 1952, issued by Manchester for purported charges in the sum of $2,884.00, for machine shop operations on the housing

of said mortar conversion kits, pursuant to a purchase order issued by PEMCO to Manchester and dated April 16, 1952. In truth and in fact the work described in said purchase order and said invoice was not performed either in whole or in part, and each and every statement and entry in said invoice was false, fictitious and fraudulent. Said invoice was furnished by defendant Ebeling to defendant Emerling and became the basis of a portion of costs contained in a statement presented by PEMCO to the Department of the Army, Ordnance, on or about January 6, 1953, for the purpose of repricing.

In violation of Section 1001, Title 18, United States Code.

F nm 10,000 or I nm 5 y or b

Third Count.

The Grand Jury further charges:

1. The Grand Jury realleges all of the allegations contained in paragraph numbered "1" of the first count of this indictment.

2. Commencing on or about the 16th day of April, 1952, and continuing up to and including the date of the return of this indictment, within the Eastern Division of the Eastern District of Missouri, the defendants

Joseph Mary Ebeling, and
Charles G. Emerling

did Willfully, Feloniously, Wrongfully and Unlawfully make and use a false writing knowing the same to contain false, fictitious and fraudulent statements and entries, in a matter within the jurisdiction of the Department of the Army, Ordnance, a Department and Agency of the United States.

3. Said false writing was an invoice dated April 16, 1952, issued by Manchester for purported charges in the sum of $3,703.00, for machine shop operations on the striker of said mortar conversion kits, pursuant to a purchase order issued by PEMCO to Manchester and dated April 16, 1952. In truth and in fact the work described in said purchase order and said invoice was not performed either in whole

or in part, and each and every statement and entry in said invoice was false, fictitious and fraudulent. Said invoice was furnished by defendant Ebeling to defendant Emerling and became the basis of a portion of costs contained in a statement presented by PEMCO to the Department of the Army, Ordnance, on or about January 6, 1953, for the purpose of repricing.

In violation of Section 1001, Title 18, United States Code.

F nm 10,000 or I nm 5 y or b

Fourth Count.

The Grand Jury further charges:

1. The Grand Jury realleges all of the allegations contained in paragraph numbered "1" of the first count of this indictment.

2. Commencing on or about the 16th day of April, 1952, and continuing up to and including the date of the return of this indictment, within the Eastern Division of the Eastern District of Missouri, the defendants

Joseph Mary Ebeling, and
Charles G. Emerling

did Willfully, Feloniously, Wrongfully and Unlawfully make and use a false writing knowing the same to contain false, fictitious and fraudulent statements and entries, in a matter within the jurisdiction of the Department of the Army, Ordnance, a Department and Agency of the United States.

3. Said false writing was an invoice dated April 16, 1952, issued by Manchester for purported charges in the sum of $3,888.00, for machine shop operations on the adapter of said mortar conversion kits, pursuant to a purchase order issued by Pemco to Manchester dated April 16, 1952. In truth and in fact the work described in said purchase order and said invoice was not performed either in whole or in part, and each and every statement and entry in said invoice was false, fictitious and fraudulent. Said invoice was furnished by defendant Ebeling to defendant Emerling and became the basis of a portion of costs contained in a statement presented by PEMCO to the Department of the

Army, Ordnance, on or about January 6, 1953, for the purpose of repricing.

In violation of Section 1001, Title 18, United States Code.

F nm 10,000 or I nm 5 y or b

Fifth Count.

The Grand Jury further charges:

1. The Grand Jury realleges all of the allegations contained in paragraph numbered "1" of the first count of this indictment.

2. Commencing on or about the 28th day of April, 1952, and continuing up to and including the date of the return of this indictment, within the Eastern Division of the Eastern District of Missouri, the defendants

Joseph Mary Ebeling, and
Charles G. Emerling

did Willfully, Feloniously, Wrongfully and Unlawfully make and use a false writing knowing the same to contain false, fictitious and fraudulent statements and entries, in a matter within the jurisdiction of the Department of the Army, Ordnance, a Department and Agency of the United States.

3. Said false writing was an invoice dated April 28, 1952, issued by Manchester for purported charges in the sum of $1,194.80 for machine shop operations on the housing of said mortar conversion kits, pursuant to a purchase order issued by PEMCO to Manchester and dated April 16, 1952. In truth and in fact the work described in said purchase order and said invoice was not performed either in whole or in part, and each and every statement and entry in said invoice was false, fictitious and fraudulent. Said invoice was furnished by defendant Ebeling to defendant Emerling and became the basis of a portion of costs contained in a statement presented by PEMCO to the Department of the Army, Ordnance, on or about January 6, 1953, for the purpose of repricing.

In violation of Section 1001, Title 18, United States Code.

F nm 10,000 or I nm 5 y or b

Sixth Count.

The Grand Jury further charges:

1. The Grand Jury realleges all of the allegations contained in paragraph numbered "1" of the first count of this indictment.

2. Commencing on or about the 28th day of April, 1952, and continuing up to and including the date of the return of this indictment, within the Eastern Division of the Eastern District of Missouri, the defendants

Joseph Mary Ebeling, and
Charles G. Emerling

did Willfully, Feloniously, Wrongfully and Unlawfully make and use a false writing knowing the same to contain false, fictitious and fraudulent statements and entries, in a matter within the jurisdiction of the Department of the Army Ordnance, a Department and Agency of the United States.

3. Said false writing was an invoice dated April 28, 1952, issued by Manchester for purported charges in the sum of $2,592.00 for machine shop operations on the adapter of said mortar conversion kits, pursuant to a purchase order issued by PEMCO to Manchester and dated April 16, 1952. In truth and in fact the work described in said purchase order and said invoice was not performed either in whole or in part, and each and every statement and entry in said invoice was false, fictitious and fraudulent. Said invoice was furnished by defendant Ebeling to defendant Emerling and became the basis of a portion of costs contained in a statement presented by PEMCO to the Department of the Army, Ordnance, on or about January 6, 1953, for the purpose of repricing.

In violation of Section 1001, Title 18, United States Code.

F nm 10,000 or I nm y or b

Seventh Count.

The Grand Jury further charges:

1. The Grand Jury realleges all of the allegations contained in paragraph numbered "1" of the first count of this indictment.

2. Commencing on or about the 6th day of May, 1952, and continuing up to and including the date of the return of this indictment, within the Eastern Division of the Eastern District of Missouri, the defendants

Joseph Mary Ebeling, and
Charles G. Emerling

did Willfully, Feloniously, Wrongfully and Unlawfully make and use a false writing knowing the same to contain false, fictitious and fraudulent statements and entries, in a matter within the jurisdiction of the Department of the Army, Ordnance, a Department and Agency of the United States.

3. Said false writing was an invoice dated May 6, 1952, issued by Manchester for purported charges in the sum of $1,296.00, for machine shop operations on the adapter of said mortar conversion kits, pursuant to a purchase order issued by PEMCO to Manchester and dated April 16, 1952. In truth and in fact the work described in said purchase order and said invoice was not performed either in whole or in part, and each and every statement and entry in said invoice was false, fictitious and fraudulent. Said invoice was furnished by defendant Ebeling to defendant Emerling and became the basis of a portion of costs contained in a statement presented by PEMCO to the Department of the Army, Ordnance, on or about January 6, 1953, for the purpose of repricing.

In violation of Section 1001, Title 18, United States Code.

F nm 10,000 or I nm 5 y or b

Eighth Count.

The Grand Jury further charges:

1. The Grand Jury realleges all of the allegations contained in paragraph numbered "1" of the first count of this indictment.

2. Commencing on or about the 6th day of May, 1952, and continuing up to and including the date of the return

of this indictment, within the Eastern Division of the Eastern District of Missouri, the defendants

Joseph Mary Ebeling, and
Charles G. Emerling

did Willfully, Feloniously, Wrongfully and Unlawfully make and use a false writing knowing the same to contain false, fictitious and fraudulent statements and entries, in a matter within the jurisdiction of the Department of the Army, Ordnance, a Department and Agency of the United States.

3. Said false writing was an invoice dated May 6, 1952, issued by Manchester for purported charges in the sum of $1,352.40, for machine shop operations on the striker of said mortar conversion kits, pursuant to a purchase order issued by PEMCO to Manchester and dated April 16, 1952. In truth and in fact the work described in said purchase order and said invoice was not performed either in whole or in part, and each and every statement and entry in said invoice was false, fictitious and fraudulent. Said invoice was furnished by defendant Ebeling to defendant Emerling and became the basis of a portion of costs contained in a statement presented by PEMCO to the Department of the Army, Ordnance, on or about January 6, 1953, for the purpose of repricing.

In violation of Section 1001, Title 18, United States Code.

F nm 10,000 or I nm 5 y or b

Ninth Count.

The Grand Jury further charges:

1. The Grand Jury realleges all of the allegations contained in paragraph numbered "1" of the first count of this indictment.

2. Commencing on or about the 17th day of March, 1952, and continuing up to and including the date of the return of this indictment, within the Eastern Division of the Eastern District of Missouri, the defendants

Joseph Mary Ebeling, and
Charles G. Emerling

did Willfully, Feloniously, Wrongfully and Unlawfully combine, conspire, confederate and agree together and with the aforesaid PEMCO, a corporation, one David Neal Jones, one Carl Emerling, and with divers other persons whose true names and identities are to the grand jurors unknown, to defraud the United States by preparing, keeping and presenting false records and accounts of PEMCO's costs of the performance of the said contract dated May 31, 1951, and particularly the costs of purported subcontracts under said contract entered into between said PEMCO and said Manchester, to the end that PEMCO'S said costs would be wrongfully increased.

3. It was a part of said conspiracy that defendants would cause purchase orders on PEMCO forms to be issued, to falsely indicate allotments of subcontract work by PEMCO to Manchester under said contract of May 31, 1951. It was further a part of said conspiracy that defendants would cause false material requisitions to be prepared on PEMCO forms, to falsely indicate that material was being requisitioned by PEMCO for the performance of work called for in said purchase orders. It was further a part of said conspiracy that defendants would cause false shipping tickets to be prepared on PEMCO forms, to falsely indicate that material was shipped by PEMCO to Manchester for the purpose of said subcontract work. It was further a part of said conspiracy that defendants would cause false inspection tickets to be prepared on Manchester forms, to falsely indicate that finished work pursuant to said subcontracts was delivered by Manchester to PEMCO and inspected. It was further a part of said conspiracy that defendants would cause false invoices to be prepared on Manchester forms, to wrongfully charge PEMCO for work purportedly done by Manchester pursuant to said subcontracts.

4. To effect the object of the conspiracy, the following acts were performed:

1. Defendant Joseph Mary Ebeling caused a certain false invoice to be prepared on a Manchester form bearing the

date March 17, 1952, purporting to state charges owing to Manchester by PEMCO in the sum of $3,502.00;

2. Defendant Joseph Mary Ebeling caused a certain false invoice to be prepared on a Manchester form bearing the date April 10, 1952, purporting to state charges owing to Manchester by PEMCO in the sum of $2,884.00;

3. Defendant Joseph Mary Ebeling caused a certain false invoice to be prepared bearing the date April 16, 1952, purporting to state charges owing to Manchester by PEMCO in the sum of $3,703.00;

4. Defendant Joseph Mary Ebeling caused a certain false invoice to be prepared bearing the date April 16, 1952, purporting to state charges owing to Manchester by PEMCO in the amount of $3,888.00;

5. Defendant Joseph Mary Ebeling caused a certain false invoice to be prepared bearing the date April 28, 1952, purporting to state charges owing to Manchester by PEMCO in the amount of $1,194.80;

6. Defendant Joseph Mary Ebeling caused a certain false invoice to be prepared bearing the date April 28, 1952, purporting to state charges owing to Manchester by PEMCO in the sum of $2,592.00;

7. Defendant Joseph Mary Ebeling caused a certain false invoice to be prepared, bearing the date May 6, 1952, purporting to state charges owing to Manchester by PEMCO, in the sum of $1,296.00;

8. Defendant Joseph Mary Ebeling caused a certain false invoice to be prepared, bearing the date May 6, 1952, purporting to state charges owing to Manchester by PEMCO in the sum of $1,352.40;

9. The said David Neal Jones caused to be prepared a false inspection ticket on PEMCO form, bearing the date March 17, 1952, to falsely indicate receipt of finished work by Manchester for PEMCO pursuant to said subcontract;

10. The said David Neal Jones caused to be prepared a false inspection ticket on PEMCO form, bearing the date April 10, 1952, to falsely indicate receipt of finished work by Manchester for PEMCO pursuant to said subcontract;

11. The said David Neal Jones caused to be prepared a false inspection ticket on PEMCO form, bearing the date April 16, 1952, to falsely indicate receipt of finished work by Manchester for PEMCO pursuant to said subcontract;

12. The said David Neal Jones caused to be prepared a false inspection ticket on PEMCO form, bearing the date April 16, 1952, to falsely indicate receipt of finished work by Manchester for PEMCO pursuant to said subcontract;

13. The said David Neal Jones caused to be prepared a false inspection ticket on PEMCO form, bearing the date April 28, 1952, to falsely indicate receipt of finished work by Manchester for PEMCO pursuant to said subcontract;

14. The said David Neal Jones caused to be prepared a false inspection ticket on PEMCO form, bearing the date April 28, 1952, to falsely indicate receipt of finished work by Manchester for PEMCO pursuant to said subcontract;

15. The said David Neal Jones caused to be prepared a false inspection ticket on PEMCO form, bearing the date May 6, 1952, to falsely indicate receipt of finished work by Manchester for PEMCO pursuant to said subcontract;

16. The said David Neal Jones caused to be prepared a false inspection ticket on PEMCO form, bearing the date May 6, 1952, to falsely indicate receipt of finished work by Manchester for PEMCO pursuant to said subcontract;

17. The said Carl Emerling, one of the co-conspirators, caused to be prepared a certain false account payable voucher on PEMCO form bearing the date of July 28, 1952, which authorized payment of $3,888.00 by PEMCO to Manchester for purported work on said subcontracts, although no such work was done;

18. The said Carl Emerling, one of the co-conspirators, caused to be prepared a certain false account payable voucher on PEMCO form bearing several dates, March 17, 1952, April 10, 1952, April 28, 1952, and April 25, 1952, which authorized payment of the respective sums of $3,502.00, $2,884.00, $1,194.80, and $2,592.00, a total of $10,172.80, by PEMCO to Manchester for purported work on said subcontracts, although no such work was done;

19. The said Carl Emerling, one of the co-conspirators, caused to be prepared a certain false accounts payable voucher on PEMCO form, bearing two separate dates, each May 6, 1952, which authorized payment in the respective sums of $1,352.40 and $1,296.00, a total of $2,648.40, by PEMCO to Manchester for purported work on said subcontracts, although no such work was done.

In violation of Section 371, Title 18, United States Code.

F nm 10,000 or I nm 5 y or b

A True Bill.

.....
Foreman.

.....
United States Attorney.

United States District Court
Eastern District of Missouri
Eastern Division.

United States of America,
Plaintiff,
vs.
Joseph Mary Ebeling, and Charles G. Emerling,
Defendants.
No. 28379(2).

Motion by Defendants to Dismiss the Indictment.

(Filed Nov. 22, 1955.)

Come now the defendants herein and move that the indictment be dismissed on the following grounds:

1. The indictment does not state facts sufficient to constitute an offense against the United States.

2. The indictment was not found within three years next after the alleged acts were committed.

3. The indictment should be dismissed for the reason that the charges contained therein are void for inconsistency.

Defendants request oral argument.

MICHAEL J. EBELING,
Attorney for defendant,
Joseph Mary Ebeling,
422 S. Hanley,
St. Louis, Missouri,
PA. 5-6115,

TED A. BOLLINGER, JR.,
Attorney for defendant,
Charles G. Emerling,
408 Olive St.,
St. Louis, Missouri,
CH. 1-0202.

By .....
TED A. BOLLINGER, JR.

In the United States District Court,
Eastern District of Missouri,
Eastern Division.

United States of America,
Plaintiff,
vs.
Joseph Mary Ebeling and Charles G. Emerling,
Defendants.
} No. 28379 (2).

Motion for Bill of Particulars.

(Filed Nov. 25, 1955.)

Come now the defendants Joseph Mary Ebeling and Charles G. Emerling, and move the Court to require the plaintiff to furnish a Bill of Particulars to advise him

concerning vague, ambiguous and uninformative allegations contained in each of the Counts of the indictment and as grounds for this Motion, state that this information is needed to enable them to properly prepare their defense for trial, to prevent unfair and prejudicial surprise at the trial and to protect the defendants against a second prosecution for the same offense.

A. The plaintiff should be required to state the following information for all counts of the indictment amplifying and clarifying the vague, ambiguous and uninformative allegations contained therein.

1. The Government number of the contract alleged in paragraph 1 of the indictment.

2. The name of the person or persons executing the said contract on behalf of the Department of the Army, Ordnance.

3. The name of the person or persons executing said contract on behalf of Production Engineering & Manufacturing Co.

4. Whether or not the payments made by the United States to Production Engineering & Manufacturing Co. pursuant to said contract were repriced by any Department or Agency of the United States.

5. If the answer to number 4 above is yes, then the plaintiff should state the result of said repricing.

6. Plaintiff should state the person or persons who repriced said payments by the United States to Production Engineering & Manufacturing Co.

7. The statements or entries the plaintiff claims to be false, fictitious and fraudulent.

8. The person or persons who prepared the invoices alleged by the Government to be false writings.

9. The machine shop operations described in said invoices.

10. The manner in which said invoice was furnished by defendant Ebeling to defendant Emerling, that is, by mail or hand delivery.

11. The name of the person or persons mailing said invoice or delivering said invoice.

12. The name or names of the person or persons preparing the statement presented by PEMCO to the Department of the Army, Ordnance.

13. State whether or not either of the defendants executed said statement.

14. If neither of the defendants executed said statement, then the name or names of the person or persons so executing said statement.

15. The name or names of the person or persons receiving said statement on behalf of the Department of the Army, Ordnance.

16. The dates of payments made by the Department of the Army, Ordnance to defendant PEMCO on the said contract.

17. The date when said payments by the Department of the Army, Ordnance to PEMCO ceased.

18. Whether or not the face amount of the contract was paid in full by the Department of the Army, Ordnance.

19. The name or names of the person or persons preparing and issuing purchase orders from PEMCO to Manchester.

20. The name or names of the person or persons receiving said purchase orders by Manchester from PEMCO.

21. The Government should be required to state whether or not the parts for the mortar conversion kits described in each count of the indictment were performed and delivered to the United States pursuant to the said contract.

22. If the answer is yes, then the Government should state who performed said work.

23. If the answer to number 21 above is no, the Government should be required to state who delivered said parts.

24. Whether or not payment was made by PEMCO to Manchester for the amount alleged in each count of the indictment.

25. The name or names of the person or persons making such payment on behalf of PEMCO.

26. The name or names of the person or persons receiving said payment on behalf of Manchester.

27. If Manchester actually received payment from PEMCO, then the Government should be required to state whether or not such payments were properly recorded in the books and records of Manchester and deposited to the bank account of Manchester.

28. The name or names of the person or persons in charge of the books and records of Manchester.

B. The plaintiff should be required to state the following information for Count IX of the indictment amplifying and clarifying the vague, ambiguous and uninformative allegations contained therein.

1. Whether or not there was a subcontract in writing existing between PEMCO and Manchester.

2. The name or names of the person or persons entering into said subcontracts on behalf of Manchester and PEMCO.

3. If said subcontracts were not in writing, the name or names of the person or persons orally agreeing to entering into said subcontracts.

4. What material was requisitioned by PEMCO for the performance of work called for in its purchase orders.

5. The name or names of the person or persons causing the preparation of false shipping tickets on PEMCO forms.

6. The name or names of the person or persons actually preparing said shipping tickets.

7. The name or names of the person or persons preparing false inspection tickets on Manchester forms.

Defendants request oral argument.

MICHAEL J. EBELING,
Attorney for Defendant
Joseph Mary Ebeling,
422 S. Hanley,
St. Louis, Missouri,
PA 5-6145

TED A. BOLLINGER, JR.,
Attorney for Defendant
Charles G. Emerling,
406 Olive St.,
St. Louis, Missouri,
CH 1-0202,

By .....
TED A. BOLLINGER, JR.

Order Overruling Motion for Bill of Particulars, Etc.

Before Judge Hulen, Court No. 2.

(Filed November 25, 1955.)

Separate joint motions of defendants (1) for bill of particulars; (2) for discovery and inspection and (3) to stay proceedings argued, submitted and each overruled without prejudice. Separate joint motion of defendants to dismiss, argued, submitted and overruled.

United States District Court
Eastern District of Missouri
Eastern Division.

United States of America,
Plaintiff,
v.
Joseph Mary Ebeling, and Charles G. Emerling,
Defendants.
No. 28379 (2).

Bill of Particulars.

(Filed Nov. 30, 1955.)

The United States of America by Forrest Boecker, Assistant United States Attorney, furnishes the following particulars and offer of discovery:

1. The contract dated May 31, 1951, between the United States and Production Engineering and Manufacturing Company is available, in the form of an exemplified copy, in the office of the United States Attorney.

2. The repricing of this contract has not been completed, and the repricing is under the jurisdiction of the Small Arms and Miscellaneous Branch of the St. Louis Ordnance District, in charge of C. Howard Kirk, Chief of said branch, 11th and Olive Streets, St. Louis 1, Missouri.

3. The several invoices referred to in the respective Counts of the indictment are available for inspection in the office of the United States Attorney. The United States contends that every item of each invoice is false.

4. The statement of costs presented by the Production Engineering and Manufacturing Company to the United States, referred to in the Third Count of the indictment, is available for inspection in the office of the United States Attorney. It was prepared by the firm of Heckmann and

Schoop, Certified Public Accountants, and their agent, William J. Birchler. Said statement was received by mail at the St. Louis Ordnance District, 11th and Olive Streets, St. Louis 1, Missouri.

5. The United States has paid to the Production Engineering and Manufacturing Company sums aggregating $602,608.56 applicable to said contract dated May 31, 1951, and in addition to said sums, the United States claims the option to credit additional sums aggregating $289,979.09, which represents over-payment on other contracts, to said contract of May 31, 1951.

6. Amounts actually paid by Production Engineering and Manufacturing Company to Manchester Machine Company, in payment of the respective invoices referred to in the several Counts of the indictment are as follows:

Count	Date of Invoice	Amount Paid
I	3 17 52	$ 3,502.00
II	4 10 52	2,884.00
III	4 16 52	3,680.46
IV	4 46 52	3,816.72
V	4 28 52	1,194.80
VI	4 28 52	2,572.56
VII	5 6 52	1,296.00
VIII	5 6 52	1,352.40
	Total Payments—	$20,298.94

7. The respective purchase orders referred to in paragraph 3 of each Count of the indictment were all written. They are available for inspection in the office of the United State Attorney.

8. The false material requisitions referred to in paragraph 3 of the Ninth Count of the indictment, as well as all the documents referred to in paragraph 4 of the Ninth Count of the indictment, are available for inspection in the Office of the United States Attorney. Other documents referred to in paragraph 3 of the Ninth Count of the indictment are not in the possession of the United States.

9. The United States cannot say with certainty who performed the clerical work in preparing each of the false documents referred to, with more particularity than as has been alleged in the several Counts of the indictment.

FORREST BOECKER,
Assistant United States Attorney.

Transcript of Trial Proceedings.

At the trial of this cause commencing on March 19, 1956, before Honorable Ruby M. Hulen, Judge, and a jury, in his courtroom in the United States Courthouse at St. Louis, Missouri, the following proceedings were had:

There were called and sworn for voir dire examination, 28 jurors for the regular panel, and thereafter a jury was duly empaneled and sworn.

Narrative Transcript of Testimony.

(An opening statement was made by Mr. Forrest Boecker on behalf of the Government. Defendants reserved their opening statements.) (For ease in reference, the term "PEMCO", hereinafter used, shall refer to Production Engineering & Manufacturing Co., and the term "Manchester", hereinafter used shall refer to Manchester Machine Company.)

The government offered the following evidence:

CECIL O'REAR testified as follows:

Direct Examination, by Mr. Boecker.

I am an investigator with the United States General Accounting Office, which office is under the Comptroller General. I have here a true copy of the original contract, also the original contract No. DA-23-072-ORD-138, the parties to which were the United States Government and Production Engineering and Manufacturing Co. The original contract bears the date May 31, 1951. (The contract

was designated and identified as plaintiff's Exhibit 1, which was offered and received in evidence, and hereinafter referred to as Contract 138.)

C. HOWARD KIRK testified as follows:

Direct Examination, by Mr. Boecker.

I am a contract administrator for the Department of the Army, St. Louis Ordnance District, which is a part of the Ordnance Department under the jurisdiction of the Secretary of Defense. Plaintiff's Exhibit 1 is a contract under my administration, which contract calls for the manufacture of parts and assemblies. Article 27, Price Redetermination Clause, paragraphs a and b thereof, is a portion of the contract which requires the filing of a statement of contractor's costs producing the items covered by the contract. Plaintiff's Exhibit 2 is the statement of costs of performance under Contract 138, filed by Production Engineering and Manufacturing Co., which cost statement relates to the repricing negotiation under Plaintiff's Exhibit 1, the contract. Plaintiff's Exhibit 2, the cost statement, was signed by Carl Emerling and hand carried to me by either Carl Emerling or Herman Katcher.

We caused an audit to be performed and entered into price redetermination negotiations pursuant to receipt of the cost statement.

Mr. Boecker: We would like to offer Exhibit 2 at this time, if it please the court, and offer the photostat in lieu of the original, which should be returned to the files of the government.

Mr. Duggan: Defendant Ebeling objects to the introduction against him because no foundation has been laid to show he is familiar with it or it was called to his attention or that he had any knowledge of the filing.

The Court: I will reserve ruling at this time.

Mr. Bollinger: Same objection, because the name Carl is not the same as Charles G. Emerling.

The Court: The court is well aware of that fact. Proceed.

Mr. Boecker: Did you further procure certain blueprints from the files of your office? A. Yes.

Q. Would you hand them over, please?

The Court: Is there any objection on using the photostats from defendants?

Mr. Duggan: None, except I don't want to waive my objection.

The Court: Do you make any issue of using photostats?

Mr. Duggan: None whatever. I don't understand whether government's position as these are original exhibits and then they propose to withdraw them and use the photostats——

The Court: Develop that, counselor.

Mr. Boecker: Mr. Kirk, you have handed me three separate sheets of paper, each appearing to be a blueprint of some mechanical device, labeled respectively 3, 4 and 5. Will you identify 3, 4 and 5, please?

Mr. Duggan: If the court please, I am going to object for defendant Ebeling unless it first be shown Exhibits 3, 4 and 5 were ever displayed to Ebeling either in original form or copy form by the plaintiff or some agent of the plaintiff.

The Court: Reserve ruling at this time. Proceed.

Exhibit 3 is a blueprint of the housing, the technical description being a reproduction from an original tracing. This is a drawing of the part which the contractor was to produce and deliver to the government.

Mr. Duggan: Before the witness testifies as to that I would like to renew my objection to Exhibit 3.

The Court: Same ruling.

Exhibit 4 is a blueprint of an original tracing of the striker which is one of the parts called for to be produced and delivered to the government by the contractor. Exhibit 5 is a blueprint of the adapter which was also called

for under this contract to be produced and delivered to the government by the contractor.

Mr. Boecker: Now, as to each of 3, 4 and 5, can you state whether they are true reproductions of original drawings or tracings relating to those particular parts of the contract?

Mr. Duggan: Just a moment, please. I ask that the answer be stricken. I desire to object on the grounds no qualification or foundation laid with respect to the witness being an expert regarding these matters.

The Court: Do you know whether those are copies like those of the drawings delivered under the contract?

The Witness: We never gave the tracing to a contractor. We always reproduce them and furnish the contractor with copies.

The Court: Are those the same kind of copies furnished to the contractor?

The Witness: To the best of my knowledge.

The Court: Do you have any——

The Witness: I have no other means of producing copies except——

The Court: All you have is either those copies or original tracings?

The Witness: All I can——

Mr. Duggan: I desire to object on the further ground this contract was entered into on May of '51, and this witness did not come with the government until 1952. He would have no knowledge as to whether PEMCO——

The Court: Overruled.

Mr. Bollinger: No showing here that these copies compare with the working copies in the hands of the corporation.

The Court: They can't offer all their proof at once. Overruled. The cost statement, Exhibit 2, bears the date of January 15, 1953, and my stamp reflects I received it on January 16, 1953.

Mr. Boecker: Let me hand you what has been marked Plaintiff's Exhibit 6. Can you identify that?

Mr. Bollinger: We would like to object to the offer of this exhibit.

The Court: It hasn't been offered.

Mr. Bollinger: To the testimony, if the court please. First of all, this man has testified he is a contract negotiator, not an engineer, that these matters coming to him necessarily would come——

The Court: Counsel, just make your objection. I don't care to hear argument.

Mr. Bollinger: It would necessarily be hearsay on his part.

The Court: Overruled.

Mr. Bollinger: The exhibit now is in a finished form and we are dealing with an object in a semi-completed form.

The Court: Overruled.

Mr. Boecker: Can you identify that?

A. This is called an adaptor, which is a part of the mortar kit assembly.

Q. Is it the same article which is referred to in Contract 138 and referred to in one of these reproductions of blueprints? A. Yes, sir.

Q. Let me hand you another item which has been produced, a physical object, marked Paintiff's Exhibit 7. Can you identify that? A. Yes, this is a housing.

Mr. Bollinger: I would like to have the objection run to all these parts, if the court please.

The Court: It may.

A. That is the housing of the mortar kit assembly.

Mr. Boecker: Is that the same housing referred to in Contract 138? A. Yes, sir.

Q. And described in blueprint 3, 4 or 5, as the case may be? A. Yes, sir.

Q. Let me hand you another physical object, which has been marked in evidence as Plaintiff's Exhibit 8. Can you identify that? A. Yes, this is a striker.

Q. That is the same object referred to in the contract?
A. Yes, sir.
Q. And in the blueprints 3, 4 and 5? A. Yes, sir.
Q. I will hand you one other physical object, which has been marked here, Plaintiff's Exhibit 9.
A. Yes, this is a mortar kit assembly, complete with the base plate and split lock.
Q. Is that the device in its entirety covered by this contract? A. I assume——

Mr. Bollinger: We object to witness' assumption.

The Court: Is it or is it not? A. Yes, it is.

The Court: Overruled.

Mr. Boecker: Can you describe generally how Exhibit 6 enters into the assembly of that device?

Mr. Bollinger: We object to this line of questioning, no foundation laid. This man is not an engineer.

Mr. Boecker: I will withdraw it. We have other witnesses. I have no further questions.

Cross-Examination, by Mr. Bollinger.

My duties as a contract administrator is to supervise the negotiation, the awarding, the administration, the production, delivery, repricing and final closing of all contracts committed to my charge. I am not an engineer. My formal education is in accounting. I was employed by the Ordnance District on April 7, 1952, in contract negotiations. I was not employed by the government in May of 1951, the date of the signing of this contract.

Mr. Bollinger: When did you first personally participate in the contract negotiations in connection with Contract 138? A. About the first week in July of 1952.
Q. With any member of the company?
A. With Mr. Herman Katcher.
Q. Who is he?
A. He was then the secretary and contact for Production Engineering with the District.
Q. Was that in connection with price redetermination, Mr. Kirk?

A. That was in connection with all production and delivery to the government and all contracts, including 138 to the government, which was then delinquent when I took it over.

Mr. Bollinger: I move to strike that answer as not responsive.

The Court: Sustained.

Mr. Bollinger: I ask the jury be instructed to disregard it.

The Court: Jury instructed to disregard it.

The first time I sat down with any member of the corporation and discussed price with respect to contract, Exhibit 1, was shortly after January 15, 1953, after I had received a statement of costs. This contract is referred to in the government as a fixed-price contract with price redetermination article. That particular article permits an upward limitation and an unlimited downward limitation.

Mr. Bollinger: Is there any limit on how high it can go?

A. I believe ten percent upward and unlimited downward.

Q. Can you tell by referring to the contract whether the top limit is a fixed price?

A. In no event shall the redetermined price exceed the million—one million two hundred nine thousand, eight hundred thirty-five dollars and eighty-eight cents.

Q. That is a fixed ceiling, is it? A. Right.

The statement of costs submitted by the contractor is subject to governmental and price redetermination, which were done in this case by the Air Force Auditing Agency. This audit was done some time subsequent to January 15, 1953. The first formal price negotiation meeting with the contractor was about May 4, 5 or 6th of 1953, after the Air Force audit had been completed. I do not know of my own knowledge whether every item of cost referred to in the statement of costs was examined by Army auditors. No final determination of price was made as this is still subject for discussions. My records reveal that the Department of the Army, Ordnance, still owes the corporation money.

Mr. Bollinger: Mr. Kirk, on these blueprint exhibits, Nos. 3, 4 and 5, where did you obtain them?

A. From the Drawings & Specifications Section of the St. Louis Ordnance District.

Q. Is that section under your control? A. Not directly.

Q. Did you have to obtain information from some other official of the government to identify these blueprints?

A. To identify these blueprints?

Q. Yes. A. No.

Q. You were able to select them yourself?

A. I did not personally select them myself, I had them selected.

Q. Where did the parts and the mortar kit come from?

A. They were obtained by me from the Army's storage point for these parts, Rock Island Arsenal—I believe it's Rock Island, Illinois.

Q. Do you know whether or not these parts are finished and complete parts? A. Yes, they are.

Q. Did I understand you to say these came from an Army Arsenal? A. Army storage.

Q. Being stored there as replacement parts ready for shipment to some other part? A. Yes.

Cross-Examination, by Mr. Duggan.

I do not know Mr. Joseph Ebeling. I have never seen him or talked to him or discussed housings, adapters and strikers with him.

STANLEY McCLAIN testified as follows:

Direct Examination, by Mr. Boecker.

I am Secretary of PEMCO, holding that position since May of 1953. I was first employed by the company in August of 1951 as a bookkeeper; and as secretary and former bookkeeper, I am familiar with the books and records of the company. Plaintiff's Exhibit 10 is a part of the books and records of PEMCO. It is referred to as a voucher register and covers the period of May 1951 through December 1952. When an invoice is received from any company rendering an invoice to PEMCO, a voucher

is typed from that invoice and attached together; then the voucher is entered into Plaintiff's Exhibit 10 as an account payable. Exhibit 10 then is a record of various vouchers, all of which reflect people that are billing the company for work or service or materials rendered. Vouchers are numbered in numerical order and entered in the voucher register, Exhibit 10, according to numerical order. The voucher register, Exhibit 10, represents a summary of all the charges made against the company for the period covered by the register. Plaintiff's Exhibit 11 is a binder containing accounts payable vouchers, a part of the records of PEMCO for April, May and June of 1952, which vouchers were entered in the voucher register Exhibit 10. Plaintiff's Exhibit 12 is a binder of vouchers of PEMCO from July, 1952 through December 1952. Exhibits 11 and 12 are numerical files of vouchers, a carbon copy of which is attached to the actual invoices received from a supplier or other company. Plaintiff's Exhibit 13 is a binder containing copies of purchase orders that were rendered by PEMCO to other companies for supplies and services. Whenever something was ordered by our company from another company, a purchase order was made up and issued to that company which included subcontract work. The routine followed by PEMCO in preparing and issuing purchase orders was that whenever material or services were required, the person needing these materials would make up a material requisition and pass it to the purchasing agent, who then issued a purchase order for the goods or supplies. The yellow copy of this material requisition was kept with the copy of the purchase order.

Plaintiff's Exhibit 14 is a cancelled check issued by PEMCO to Manchester on May 16, 1952, bearing the signature of Charles G. Emerling. The check cleared and was charged to the company's account with the bank and bears an endorsement for Manchester. Plaintiff's Exhibit 15 is a cancelled check issued by PEMCO to Manchester on June 9, 1952, bearing the signature of Charles G. Emerling. The check cleared and was charged to the company's bank account and bears an endorsement for Manchester. Plaintiff's Exhibit 16 is a cancelled check issued by PEMCO to Manchester on July 29, 1952, bearing the signature of Charles G. Emerling, which check cleared the

company's bank account and bears the endorsement of Manchester.

Plaintiff's Exhibit 17 A-H are copies of the purchase order issued by PEMCO to Manchester on April 16, 1952, and other supporting papers in connection with the purchase order, all of which being a part of the records of PEMCO kept in the regular course of business. Plaintiff's Exhibit 17-B is the material requisition which initiated the purchase order, the writing of which appears to be that of the purchasing agent and bears the initials "C. E." which appear to be the initials of Carl Emerling. The initials of Roland Sahrhage appear on the purchase order itself, which is Exhibit 17-A. Exhibit 17-C is a shipping ticket from Manchester to PEMCO, dated April 16, 1952, for 600 adapters. Exhibits 17-D, 17-E, 17-F, 17-G and 17-H are shipping tickets and invoices from Manchester to PEMCO and are papers received from Manchester. Plaintiff's Exhibit 18-A is a copy of the purchase order issued by PEMCO to Manchester on April 16, 1952, bearing the initials of Roland Sahrhage. Exhibit 18-B is the material requisition for said purchase order, bearing the initials of Carl Emerling. Exhibits 18 C-H, inclusive, are various shipping tickets and invoices of Manchester, all of which are a part of the records of PEMCO kept in the regular course of business. Plaintiff's Exhibit 19-A is a purchase order issued by PEMCO to Manchester on April 16, 1952, bearing the initials of Roland Sahrhage. Exhibit 19-B is the material requisition for said purchase order, bearing the initials of Carl Emerling. Exhibits 19 C-F, inclusive, are papers of Manchester, all of which are the records of PEMCO kept in the regular course of business. Plaintiff's Exhibit 20-A is the carbon copy of the voucher that was made up for an invoice that was submitted by Manchester to PEMCO. Plaintiff's Exhibit 20-B is an invoice rendered by Manchester to PEMCO. Exhibit 20-C is another invoice from Manchester to PEMCO. Exhibits 20-D and 20-E and 20-F are inspection tickets relating to those invoices. Exhibit 20-G is an account payable voucher made up from invoices received from Manchester. Exhibits 20-H, 20-I, 20-J and 20-K are invoices received from Manchester by PEMCO. Exhibits 20-L, 20-M, 20-N, 20-O, 20-P, 20-Q 20-R and 20-S are inspection tickets relating to the invoices. Exhibit 20-T is a debit memo indicating

there had been some rejected parts and charged back to Manchester by PEMCO. Exhibit 20-U is a copy of the check that was issued in payment of the group of vouchers, which check was previously identified as Plaintiff's Exhibit 14.

The goods referred to in the purchase order marked Plaintiff's Exhibit 18 are covered by the voucher marked Plaintiff's Exhibit 20-G which, in turn, is connected with payment by a check marked Plaintiff's Exhibit 14. Plaintiff's Exhibit 20-G, the voucher, has been entered on the voucher register, Plaintiff's Exhibit 10, in May of 1952. Plaintiff's Exhibit 21-A is an account payable voucher of PEMCO. Exhibits 21-B and 21-C are invoices received by PEMCO from Manchester. Exhibits 21-D, 21-E and 21-F are the inspection tickets relating to the goods on the invoices. Exhibit 21-G is a copy of the check previously identified as Exhibit 15. The invoice marked Exhibit 21-B is for goods covered by the purchase order marked Exhibit 19-A, and the invoice marked 21-C is for goods under purchase order marked 17-A, and the check marked Exhibit 15 was issued in payment of invoices 21-B and 21-C. The voucher marked 21-A was entered in the voucher register, Exhibit 10, at page 126 thereof. Exhibit 22-A is another account payable voucher made up in connection with invoices received from Manchester. Exhibit 22-B is an invoice received from Manchester. Exhibit 22-C is an inspection ticket related to invoice 22-B. Exhibit 22-D is another copy of a voucher made in relation to invoices received from Manchester. Exhibit 22-E is an invoice received from Manchester. Exhibit 22-F is the inspection ticket related to the invoice Exhibit 22-E. Exhibit 22-G is a debit memo indicating there were some rejected parts and a charge back to Manchester made. Exhibit 22-H is a copy of the check issued by PEMCO in payment of the invoices 22-B and 22-E, the original of which was previously identified as Exhibit 16. Exhibit 22-B, an invoice, is covered by purchase order marked 17-A, and Exhibit 22-E, an invoice, is covered by purchase order marked Exhibit 19-A. Account payable vouchers marked 22-A and 22-D were entered in the voucher register, Exhibit 10, on page 143 thereof.

Mr. Boecker: At this time, if the court please, I would like to offer Exhibit 10, Exhibit 11, Exhibits 12, 13, 14, 15,

16, 17, 18 and all of its, 19 and all, 21 and all, 22 and all of its parts.

I offer all those exhibits of records identified by this witness.

Mr. Bollinger: If the court please, we would like to object. First of all, the matters contained in Exhibits 11, 12 and 13 do not pertain to the case, have no bearing on the case. 11 is all of the voucher binders, I understand, and I would like to include Exhibit 10, voucher register, limiting the inquiry to those items contained in the indictment.

Further objection on the ground that these—some of these records, at least, are not records kept in the normal and ordinary course of business.

The Court: Witness says they were.

Mr. Bollinger: Sir?

The Court: The witness says they were.

Mr. Bollinger: I am afraid the witness is not familiar. I would like to be heard on it if I may.

The Court: Overruled.

Mr. Duggan: On the part of defendant Ebeling, I desire to object to all of the exhibits for the reason that they do not appear to be exhibits of the plaintiff or any agency of the plaintiff. Furthermore, there has been no foundation laid to show that they have been brought home to the defendant Ebeling at any time.

The Court: I am admitting them on the theory of representation that they will be brought home.

Mr. Duggan: Of course, I want to preserve my record.

The Court: Your objection will be overruled, but that is the reason on which I am admitting them now.

Mr. Duggan: With respect to Exhibit 16, I have an additional objection. Takes a check for $7,497.16. That is not mentioned in the indictment anywhere. I also have an additional objection to Plaintiff's Exhibit 14, that is a check for $10,476.36, and that is not mentioned in the indictment.

The Court: Exhibit 15 referred to in the indictment?

Mr. Boecker: It is not referred to and I would like to say for clarification——

The Court: What is your theory on these other two checks?

Mr. Boecker: As to all the checks, the indictment refers to the invoice and the purpose.

The Court: Checks are in payment of invoice?

Mr. Boecker: They are, and in each case apparently a number of items and more than one invoice, and in some cases a charge back.

The Court: I will receive them. Overruled.

(Which said Exhibits 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 21 and 22 were received in evidence.)

Exhibit 10 is a large bound book designated as a voucher register of the corporation, and is a record of original entry of accounts payable.

Exhibit 11 is a loose leaf binder of original account payable vouchers covering April, May and June of 1952, of the corporation.

Exhibit 12 is a loose leaf binder of original accounts payable vouchers covering July through December 1952 of the corporation.

Exhibit 13 is a loose leaf binder of carbon copies of purchase orders issued by the corporation to subcontractors and suppliers.

Exhibit 14 is a cancelled check of the corporation PEMCO payable to the order of Manchester, dated May 16, 1952, in the amount of $10,476.36, signed by Charles G. Emerling, and bearing the endorsement of Manchester.

Exhibit 15 is a cancelled check of the corporation PEMCO, payable to the order of Manchester, dated June 9, 1952, in the amount of $2,648.40, signed by Charles G. Emerling, and bearing the endorsement of Manchester.

Exhibit 16 is a cancelled check of the corporation PEMCO, payable to the order of Manchester, dated July 29, 1952, signed by Charles G. Emerling, and bearing the endorsement of Manchester in the amount of $7,497.18.

Exhibit 17-A is a carbon copy of a purchase order issued to Manchester, dated April 16, 1952, bearing PEMCO No. 10250, and the word "confirmation" and calling for the performance of operations 3, 6, 7, 8, 16, 17, 18 as per route sheet on 1200 adapters @ $6.48 each for a total of $7,776.00, also bearing the initials "R. S."

Exhibit 17-B is a handwritten material requisition form of the corporation PEMCO on yellow paper, dated April 16, 1952, calling for operations 3, 6, 7, 8, 16, 17, 18 as per route sheet to be performed on 1200 adapters by Manchester; bearing the initials as ordered by "C. E." and "R. S.", and approved by "C. E.".

Exhibit 17-C is a shipping ticket from Manchester to PEMCO, dated April 16, 1952, for 600 adapters, bearing received stamp of PEMCO, dated April 16, 1952, and the initials "H. S.".

Exhibit 17-D is an invoice of Manchester to PEMCO, No. 587, dated April 16, 1952, for 600 adapters in the amount of $3,888.00.

Exhibit 17-E is a shipping ticket of Manchester to PEMCO, dated April 28, 1952, for 400 adapters, bearing a received stamp by PEMCO, dated April 28, 1952, and the initials "H. S."

Exhibit 17-F is a Manchester invoice to PEMCO, No. 591, for 400 adapters in the amount of $2,592.00; also bearing a pencil notation: "390 OK, 10 rejects."

Exhibit 17-G is a shipping ticket of Manchester to PEMCO, dated May 6, 1952, for 200 adapters, bearing received stamp of PEMCO dated May 6, 1952.

Exhibit 17-H is an invoice of Manchester to PEMCO, No. 613, dated May 6, 1952, for 200 adapters in the amount of $1,296.00.

Exhibit 18-A is a carbon copy of Purchase Order No. 10252 of PEMCO to Manchester dated April 16, 1952, bearing the word "confirmation" and ordering performance of operations 9, 10, 15, 16, 21, 22, 24, 25 as per route sheet on 1200 housings at $8.24 each for a total of $9,888.00 and bearing the initials "R. S."

Exhibit 18-B is a handwritten material requisition form of PEMCO on yellow paper, dated April 16, 1952, calling for operations 9, 10, 15, 16, 21, 22, 24, 25 as per route sheet on 1200 housings, bearing the initials as ordered by "C. E." and "R. S.", and approved by "C. E."

Exhibit 18-C is a shipping ticket of Manchester to PEMCO dated March 17, 1952, tor 425 housings and bearing PEMCO received stamp dated March 17, 1952, with initials "C. E."

Exhibit 18-D is an invoice of Manchester to PEMCO, No. 588, dated March 17, 1952, for 425 housings in the amount of $3,502.00 and bearing a pencil notation: "395 OK, 30 rejects."

Exhibit 18-E is a shipping ticket of Manchester to PEMCO, dated April 10, 1952, for 350 housings and bearing PEMCO received stamp dated April 10, 1952, and initials "C. E."

Exhibit 18-F is an invoice of Manchester to PEMCO, No. 589, for 350 housings in the amount of $2,884.00, bearing a pencil notation: "335 OK, 15 rejects."

Exhibit 18-G is a shipping ticket of Manchester, dated April 28, 1952, for 145 housings, bearing PEMCO received stamp dated April 28, 1952, and initials "H. S."

Exhibit 18-H is an invoice of Manchester to PEMCO, No. 590, for 145 housings in the amount of $616.25 and bearing a pencil notation: "138 OK, 7 rejects."

Exhibit 19-A is a carbon copy of a purchase order of PEMCO to Manchester, No. 10253, dated April 16, 1952, and bearing the word "confirmation", calling for performance of operations 6, 7, 8, 9, 10, 11, 12, 13 as per route sheet on 2500 strikers at $3.22 each for a total of $8,050.00, and initialled by "R. S."

Exhibit 19-B is a handwritten material requisition form of PEMCO, dated April 16, 1952, on yellow paper, calling for operations 6, 7, 8, 9, 10, 11, 12, 13 as per route sheet on 2500 strikers, bearing initials as ordered by "C. E." and "R. S.", and approved by "C. E."

Exhibit 19-C is a shipping ticket of Manchester to PEMCO, dated April 16, 1952, for 1150 strikers, bearing PEMCO received stamp dated April 16, 1952, and initialled "H. S."

Exhibit 19-D is an invoice of Manchester to PEMCO, No. 586, dated April 16, 1952, for 1150 strikers in the amount of $3,703.00.

Exhibit 19-E is a shipping ticket of Manchester to PEMCO dated May 6, 1952, for 420 strikers, bearing PEMCO received stamp dated May 6, 1952, initialled "H. S."

Exhibit 19-F is an invoice of Manchester to PEMCO, No. 614, dated May 6, 1952, for 420 strikers in the amount of $1,352.40.

Exhibit 21-A is an account payable voucher of PEMCO, No. 5411, dated May 6, 1952, bearing notations May 6, 1952, J#9123, P.O.#10253, amount $1,352.40; May 6, 1952, J#9101, P.O.#10250, amount $1,296.00 for a total of $2,648.40, and further bearing notation, "approved C. E."

Exhibit 21-B is an invoice of Manchester to PEMCO, No. 614, dated May 6, 1952, for 420 strikers in the amount of $1,352.40.

Exhibit 21-C is an invoice of Manchester to PEMCO, No. 613, dated May 6, 1952, for 200 adapters in the amount of $1,296.00.

Exhibit 21-D is an inspection report of PEMCO, dated May 13, 1952, of 200 adapters received, with 200 adapters accepted, inspected by D. N. J., OK by D. N. J.

Exhibit 21-E is an inspection report of PEMCO, dated May 14, 1952, for 420 strikers received, 417 accepted, 3 returned for rework, inspected by D. N. J. on May 15, 1952, OK D. N. J.

Exhibit 21-F is an inspection report of PEMCO, dated May 15, 1952, for 3 strikers received, 3 accepted, inspected by D. N. J., OK D. N. J.

Exhibit 21-G is a carbon copy of PEMCO check No. 4520, dated June 9, 1952, in the amount of $2,648.40, payable to Manchester.

Exhibit 22-A is a carbon copy of an account payable voucher of PEMCO, No. 7165, bearing notation, paid July 28, 1952, J#9101, P.O.#10250, in the amount of $3,888.00.

Exhibit 22-B is an invoice of Manchester to PEMCO, No. 587, dated April 16, 1952, for 600 adapters in the amount of $3,888.00.

Exhibit 22-C is an inspection report of PEMCO dated April 23, 1952, for 600 adapters received, 589 accepted, 11 scrap with the notation, "scored holes will not clean up." Inspected by D. N. J., April 24, 1952, OK D. N. J.

Exhibit 22-D is a carbon copy of an account payable voucher of PEMCO, No. 7166, bearing notation, paid July 29, 1952, J#9123, P.O.#10253, amount of $3,703.00, approved by "C. E."

Exhibit 22-E is an invoice of Manchester to PEMCO, No. 586, dated April 16, 1952, for 1150 strikers in the amount of $3,703.00.

Exhibit 22-F is an inspection report of PEMCO dated April 25, 1952, for 1150 strikers received, 1143 accepted, 7 scrap, bearing the notation "overall length undersize (scrap)," inspected April 25, 1952, D. N. J., OK D. N. J.

Exhibit 22-G is a carbon copy of a debit memorandum of PEMCO to Manchester dated July 29, 1952, for 7 strikers on Invoice #586 in the amount of $22.54; 11 adapters on Invoice #587 in the amount of $71.28.

Exhibit 22-H is a carbon copy of a PEMCO check, No. 4903, dated July 29, 1952, in the amount of $7,497.18, payable to Manchester.

I had no dealings with Manchester relating to any of the transactions referred to. My function was that of recording these various items. I was employed by a man named Mr. Vernon Carreras and took my orders from him. I worked under Mr. Carreras until he left the company about August of 1952. As far as I know, Mr. Carreras was responsible to Mr. Emerling.

Cross-Examination, by Mr. Bollinger.

The normal office procedure on receipt of an invoice was that the account payable voucher was typed with the invoice being attached to the duplicate of the voucher. The account payable voucher was prepared by one of the girls in the office. The original account payable voucher was put in the numerical file and the duplicate with the invoice attached to it was sent back to the shop superintendent's office to be further handled by the purchasing agent. After material had been received, an inspection ticket was made up in the shop and brought to the shop office and compared to the invoice before the invoice was sent back for payment. Each invoice has an inspection ticket attached thereto. The inspection ticket was made up by the purchasing agent and initialled by the inspector. The inspection ticket reflects that parts were inspected. It was the duty of the purchasing agent to hold the account payable vouchers until he received the inspection ticket from the shop. He then attached

the inspection ticket to the account payable voucher and invoice and returned them to my office for payment. A check is drawn on the basis that the inspection tickets show the goods were received and acceptable. In the event of rejected parts, the inspection tickets would show how many of the parts were not acceptable and those parts which were rejected were deducted in the payment by way of a debit memorandum. Plaintiff's Exhibit 14 is a net check after a deduction for rejected items covered by the debit memorandum.

The account payable vouchers were approved for payment, some of which bear the initials of Carl Emerling. After approval for payment, the account payable vouchers, together with invoices, inspection tickets, were returned to me to make up the checks in payment. During the office routine, Mr. Charles G. Emerling had nothing to do with nor is there anything on the documents which indicate that Mr. Charles Emerling participated in the preparation of the documents or handled them in any way. The office routine for handling purchase orders was when a person needed material, he would make up a material requisition, submit it to the purchasing agent who would then make up a purchase order to a supplier. Purchase order records were kept by the purchasing agent. It was the duty of the purchasing agent to compare the purchase orders with the account payable vouchers.

Plaintiff's Exhibits 17, 18 and 19 reflect that Mr. Charles Emerling had nothing to do with the preparation or handling of the documents. The entries made in Plaintiff's Exhibit 10, the voucher register, have no distinguishing marks as to whether or not a charge is made on the prime contract, Exhibit 1, or to civilian work.

Mr. Duggan: And at this time, if the court please, in order to preserve my record I would like to move to strike the direct and cross-examination of Mr. McClain and instruct the jury to disregard it, for the reason there is no reference to defendant Ebeling and no reference to any testimony by Mr. McClain with relation to any agency of the government of the United States.

The Court: Overruled.

ROLAND SAHRHAGE testified as follows:

Direct Examination, by Mr. Boecker.

From November 1951 to August 1953, I was employed as purchasing agent of PEMCO and my duties included the preparation of purchase orders which were issued to various subcontractors in connection with the company's manufacturing activities. Exhibit 17-A is an office copy of a purchase order with my initials thereon, which I personally prepared and which bears the stamp, "Contract subject to renegotiation". Plaintiff's Exhibit 26 is the original purchase order issued to Manchester, No. 10250, which called for "Perform operations 3, 6, 7, 8, 16, 17, 18 as per route sheet on 1200 adapters, Dwg. B-72340419, $6.48 each, Total $7,776.00", bearing date of April 16, 1952, together with my signature and the renegotiation stamp. In the normal course of events, I would have mailed this purchase order to Manchester. Plaintiff's Exhibit 17-B is a material requisition for the purchase order, Exhibits 17-A and 26, without which the purchase order would not have been written. The material requisition appears to have been ordered by Carl Emerling and approved by Carl Emerling. In the normal course of events, a blue material requisition was made that initiated the request to order material, which blue requisition would come from any department of the company. Exhibit 17-B is referred to as a yellow material requisition which I wrote for approval before typing the purchase order. The persons I looked to for approval were either the superintendent, Mr. Van Os, or Carl Emerling.

Plaintiff's Exhibit 18-A is a copy of a purchase order and Exhibit 25 is the original purchase order, all of which were prepared by me. Exhibit 25 calls for performing operations 9, 10, 15, 16, 21, 22, 24, 25 as per route sheet on 1200 housings, Dwg. 7229668, bearing my signature and a rubber stamp with reference to renegotiation. Exhibit 18-B is the yellow form of material requisition written by me which bears the initials for approval of Carl Emerling.

Plaintiff's Exhibit 19-A is a purchase order bearing my initials. Plaintiff's Exhibit 24 is the original of the purchase order. Exhibit 24 calls for performing operations 6, 7, 8, 9, 10, 11, 12, 13 as per route sheet on 2500 strikers,

Dwg. 722965, bearing my signature and the rubber stamp relating to renegotiation. Exhibit 19-B is the yellow material requisition form written by me and initialled for approval by Carl Emerling.

Cross-Examination, by Mr. Bollinger.

I was employed by the corporation in November 1951, and after one month became purchasing agent following a man by the name of McCormick. I prepared the original and copies of the purchase orders identified by me and I also prepared in my own handwriting the yellow copy of the material requisition.

Mr. Bollinger: Now, you also have testified, Mr. Sahrhage, that normally a blue copy was prepared. Isn't it a fact that a blue copy would not be prepared where there is a verbal order given?

A. In some cases.

Q. In how many cases would there not be a blue order?

A. I couldn't estimate a number.

Q. A number of them?

A. I mean it would be impossible to estimate the number of times it could be made out on a blue copy.

* * * * * * *

Q. How many blue copies were prepared where there were no yellow tickets written?

A. I couldn't tell you how many.

Q. Was there a number of them?

A. Well, it would be a few. It would be a case where the requisition was cancelled because it was decided the material wasn't required. * * *

Q. Who did you say had the final authority to approve or disapprove the ordering of merchandise?

A. Mr. Van Os or Carl Emerling.

Q. What about Mr. Emerling?

A. He would have had authority.

Q. So more than Carl or Mr. Van Os, Mr. Emerling also had authority?

A. Since he was the president, I would assume so.

Q. Did he ever personally do that? A. Not that I recall.

Q. In connection with these documents you have identi-

fied, did Mr. Charles Emerling have anything whatever to do with the preparation of those documents?

A. Not to my knowledge.

CORNELIUS VAN OS testified as follows:

Direct Examination, by Mr. Boecker.

I am the owner of a plant doing business under the name Van Os Mechanics and Experimental Works. I was employed by Mr. Charles Emerling at PEMCO from April 1945 to the latter part of August 1952, as plant superintendent. I was directly responsible to Mr. Charles Emerling. I was in charge as plant superintendent during a portion of the time work was done on the mortar conversion kit. Plaintiff's Exhibit 9 is the mortar conversion kit complete assembly. The striker, Exhibit 8, was made in PEMCO's plant. Some of the operations were done by PEMCO and some done on the outside. Manchester would not do any work unless they had an order. Exhibit 4 is a blueprint for the striker. (Exhibit 4 and Exhibit 8 were offered and received in evidence. Exhibit 4 is a blueprint of a tracing, detailing by drawing the part described as a striker with notations thereon, detailing methods of manufacture. Exhibit 8 is the physical object described as a finished machined part named a striker.) Plaintiff's Exhibit 6 is the part known as the adapter.

The Court: What do you call that piece?

The Witness: The adapter.

Mr. Boecker: Was any work on the adapter done at Manchester during the time you were superintendent?

A. Not that I did give.

Q. Well, if you didn't give it, was it done by them?

A. Not that I know of.

Exhibit 5 is a blueprint for the adapter. (Plaintiff's Exhibit 5, the blueprint, and Exhibit 6, the physical object, adapter, were offered and received in evidence. Exhibit 5 is a blueprint of a tracing, detailing by drawing the part described as an adapter with notations thereon detailing methods of manufacture. Exhibit 6 is the physical

object described as a finished machine part named an adapter.) Exhibit 7 is the housing and I cannot state whether or not any of the operations on that were done by Manchester during my employment. Plaintiff's Exhibit 3 is the blueprint for the housing. (Exhibit 3, the blueprint, and Exhibit 7, the physical object, housing, were offered and received in evidence. Exhibit 3 is a blueprint of a tracing, detailing by drawing the part described as a housing with notations thereon detailing methods of manufacture. Exhibit 7 is the physical object described as a finished machined part named a housing.)

There was some work done by Manchester on other parts and at other times. I gave them lots of orders for different parts, but not for any of these three parts.

Cross-Examination, by Mr. Bollinger.

Mr. Bollinger: Mr. Van Os, you say you were employed by Mr. Emerling at PEMCO in April of 1945?

A. Yes, sir.

Q. And you worked continuously as plant superintendent until August of 1952, is that correct? A. That is right.

Q. Now, during that period of time, how many months did you spend in Holland?

A. Well, I made one trip in '46, from April to September 10th, I believe, and I made another trip in March, 1949, if I remember, for two and a half weeks.

The Court: What year?

The Witness: 1949.

Mr. Bollinger: So, then, Mr. Van Os, your employment was not continuous?

A. Yes, sir.

Q. It was not, was it, sir? A. There was a leave——

I don't know how many employees I had under me in 1945. I was made vice president in 1945 and served as vice president and superintendent. I don't know the date of the first government contract. I don't recall how many employees I had in 1950 or 1951. In 1952 there may have been as many as 100. I don't remember as many as 180, but it was roughly 100 or so. I think there were four or five government contracts. I don't know how many parts

were made by the company. I don't know how many subcontractors the company had.

Mr. Bollinger: Did you have the job of handling all the subcontract work?

A. Most of it, not all of it.

Q. Any other person in the company?

A. From the front office, there were orders given right to the buyer, the purchasing agent.

Q. Were there many orders that went out to subcontractors that you didn't participate in?

A. I couldn't say because I wouldn't see them.

Q. I understood you to say on direct that Manchester didn't do the work because you didn't give the orders.

A. I said I didn't give the orders, I don't know if they went later.

Q. Someone else could have done it? A. Right.

Q. And that wasn't an unusual practice, was it?

A. No, sir.

Q. So that as far as you are concerned, merely the fact of an order that you did not sign indicates to you that Manchester did not do the work?

A. I was stating that I did not give the orders to them at any time on those three parts.

Q. And on that basis are you saying Manchester did not do the work? A. Not that I gave them because——

Q. Someone else could have given them the work?

A. They could have given them because I am not there day or night. I am only there at day time.

Q. There is other people on at nighttime?

A. They had a second shift on.

Q. So, now, is it your testimony you don't know whether or not Manchester Machine did this work?

A. There is something I couldn't answer because I don't run that place on account I don't see the place, I haven't given those jobs. If they had them from somebody else, I don't know.

Q. It is possible they did do the work, then, isn't it, Mr. Van Os? A. Yes.

Q. When did you say you left Production Engineering?

The Court: What was your answer to the last question?

The Witness: I said "Yes, sir," your Honor. * * *

Mr. Bollinger: Do I understand that when the plant was moved from North and South Road to Kingsland, that both plants were operating at one time? A. That is right.

Q. And what one did you stay at?

A. North and South Road for the biggest time.

Q. And when did you move to Kingsland?

A. When just about all the operations were moved over to Kingsland, I went over there too.

Q. Was some work going on at the Kingsland plant before you moved there? A. Yes, sir. • • •

Q. So that there were five or six people of the company authorized to issue orders for the work, is that right?

A. Yes, sir.

Q. And not all of the orders for work went through your hands? A. Not all of them.

Q. And merely because you didn't sign these particular orders, they mean nothing to you as to whether or not the work was performed? A. That is right.

Q. That is right? A. That is right.

Cross-Examination, by Mr. Duggan.

Q. Mr. Van Os, you know Mr. Joseph Ebeling, don't you? A. Yes, sir.

Q. Didn't you complain to Mr. Charles Emerling about the type of work Manchester was doing? Weren't you dissatisfied with the work they were doing?

A. It only happened on a few items.

Q. Well, you were dissatisfied with the work they were doing, were you not ? A. No, it came out good.

Q. Didn't you complain about any of it?

A. Only the parts that was wrong.

Q. You went to Mr. Charles Emerling and complained, didn't you?

A. Complained about the parts, you mean, or the orders?

Q. About the parts, the type of work they were doing.

A. If some of the parts came out wrong I always took it up with Mr. Emerling, yes.

Q. And you and Mr. Emerling had Mr. Ebeling in and told him about the work, didn't you?

A. If he happened to be down here, we told him about it, yes, sir. The order of procedure in the firm was that

one of five or six gentlemen would request Mr. Sahrhage to make out a purchasing order. He would do so and the subcontractor would deliver the goods and it would be signed for by Mr. Jones or the shipping clerk. PEMCO did not do all the work on Exhibits 6, 7, 8 and 9.

Redirect Examination, by Mr. Boecker.

There were other people who could have issued purchase orders or requisitions for purchase orders besides myself. One of them was Mr. Wolski in 1951, Carl Emerling in 1952. Mr. Dave Jones' position in the first half of 1952 was general shop foreman. He was under me, besides Mr. Emerling, too.

Recross-Examination, by Mr. Bollinger.

Mr. Bollinger: Do those purchase orders (Exhibits 17, 18 and 19) indicate whether or not there was any work done on that part?

Mr. Boecker: I submit that calls for a conclusion.

The Court: He may answer.

A. It does indicate, yes, sir.

Mr. Bollinger: It does indicate other subcontracts?
A. Yes, sir.

HARRY GLEN SANBORN testified as follows:

Direct Examination, by Mr. Boecker.

My occupation is a truck driver and in early 1952 through July of 1952, I performed the work of a shipping clerk. As a shipping clerk I had occasion to sign my name or initials to various papers that I handled. I ordinarily signed using the initials "H. S." There was no one other than myself working as a shipping clerk from February through July of 1952 with the initials "H. S." that I recall. I cannot identify the initials "H. S." appearing on Exhibit 17-C, a shipping ticket of Manchester. I cannot identify the initials "H. S." appearing on Exhibit 17-E, a shipping ticket of Manchester. I cannot identify the

initials "H. S." appearing on Exhibit 17-G, a shipping ticket of Manchester. There appears to be an initial "C." on Exhibit 18-C, a shipping ticket of Manchester. There are no initials "H. S." there. There appears to be an initial 'C." on Exhibit 18-E, a shipping ticket of Manchester. There are no initials "H. S." there. I have never used the letter "C." when receiving parts. The initials "H. S." on Exhibit 18-G I cannot identify. I did not put them there. The initials "H. S." appearing on Exhibit 19-C are not my initials. The initials "H. S." appearing on Exhibit 19-E are not my initials. In making initials, I did not commonly use block lettering.

Cross-Examination, by Mr. Bollinger.

I worked for PEMCO in parts of 1951 and 1952 and worked on the day shift. There were other employees with the initials "H. S." employed at the company. I was never assigned as shipping clerk and could be employed in another part of the plant during the day. When I was away from the shipping and receiving department anybody that would be authorized to sign a ticket would handle the shipping and receiving. Bruce Humphreys took over when I was leaving.

Mr. Bollinger: Do you ever recall when you asked Mr. Humphrey to put your initials on something? A. I did.

Q. Is it possible Mr. Bruce Humphrey could have put your initials to that? A. Could have.

Q. Now, merely because you can't identify these H. S.'s, does not indicate to you whether or not they came in or out of the plant? A. Indicates they came into the plant.

Q. And merely an H. S. could have been received by any H. S.? A. Could have.

Q. And also indicates Mr. Bruce Humphrey could have put your initial on? A. That is right, sir.

Q. So not necessarily being your handwriting, but your authority? A. That is right.

Cross-Examination, by Mr. Duggan.

The first time I saw Exhibit 19-C was in California about a year ago. Two FBI men talked to me in California. They wanted to know if I could identify these signatures. I told them just like I told you here, the ones

I could and the ones I couldn't. I did identify some for the FBI people. The FBI did have receipts with my initials on them.

Redirect Examination, by Mr. Boecker.

Mr. Boecker: Under what circumstances would you have authorized Bruce Humphrey to put your initials rather than you?

A. If I was busy. I had to count every piece and I would tell him to go ahead and sign a slip.

Q. He would sign his own initials, wouldn't he?

A. No, he was just helping.

Q. Do you recall him signing any of these items that I just showed you?

A. I don't recall whether he did that or not.

Q. You don't recall that he signed your name on any of those? A. No, sir.

Q. Would you recognize his writing of your initials?

A. No, sir.

CARL EMERLING testified as follows:

Direct Examination, by Mr. Boecker.

I was formerly associated with PEMCO and the defendant, Mr. Charles G. Emerling, is my father. I began work as an apprentice in August of 1946 and continued through 1952. Exhibit 17-B is a requisition for a purchase order, bearing my initials approving the requisition. I do not recall the circumstances under which I approved the purchase order. I did not personally have any dealings with Manchester relating to the purchase order. I approved the purchase order at the direction of person or persons in the company. There could have been several people as my superiors or it could have come out of a meeting of a group of people. I would have made that approval either on the direction of my father, Mr. Emerling, or the superintendent, Mr. Van Os. It would have been only one of those two by direct directions. The same situation would be true of Exhibits 18-B and 19-B.

Cross-Examination, by Mr. Bollinger.

I believe during the period of time covered by the purchase orders in question I was a vice president of the company. At that time Mr. Van Os was superintendent and vice president. I later became executive vice president. My father was president and superior to me. Dave Jones was the general foreman. Roland Sahrhage was the purchasing agent.

Mr. Bollinger: Now, did I understand you to say in answer to questions by Mr. Boecker that this yellow material requisition identified as Exhibit 19-B could have come out of a meeting? A. Yes, sir.

Q. What do you mean by that, sir?

A. Well, the meeting of the personnel of the shop, in a meeting discussing the problems of the shop, of production, of machine operations, capacity of the shop.

Q. Are those tickets that you have previously looked at in your handwriting? A. No, sir, I don't believe they are.

Q. What on that ticket is in your handwriting?

A. The "Approved by."

Q. So that the yellow ticket was prepared by someone other than yourself? A. Yes, sir.

Q. Now, you mention this meeting. Who would participate in company meetings?

A. Anyone that would have information pertaining to the facts.

Q. Not ordinary production workers?

A. No, sir, lead men, foremen, somebody in the shop that might have a problem. It could cover a multitude of things.

Q. You had a foreman, a superintendent?

A. We had several foremen.

Q. Did you have department foremen? A. Yes, sir.

Q. Would they participate in company meetings for work to be ordered? A. If needed, yes, sir.

Q. Can you look at those exhibits and state whether or not from your recollection they came as directions of one specific person or whether they came from a meeting of a number of people? A. No, sir.

The Court: What did you mean a moment ago when you said that only Mr. Van Os and Mr. Emerling could authorize you?

The Witness: They were the ones to say go ahead and order something.

The Court: I understand you to say now a meeting of others than Mr. Van Os and Mr. Emerling could authorize.

The Witness: No, sir, it would be decided in a meeting that something would. It would have to be at their direction.

The Court: Whose directions?

The Witness: Mr. Van Os or Mr. Emerling.

The Court: I am not sure I understand you.

The Witness: We would have a meeting of different personnel in the shop of problems deciding perhaps whether we would need additional parts, if we did not have the capacity in the shop.

The Court: If they decided you would get it, would you go to Mr. Van Os or Mr. Emerling?

The Witness: They would probably be there.

The Court: What if they weren't?

The Witness: I would still have to go to them, but if a foreman decided we did not have the capacity, we would take it up in a meeting.

The Court: Then would you have to take it up with Mr. Van Os?

The Witness: That is right.

The Court: You wouldn't sign it without the authority of one or the other, whether it went through a meeting or not?

The Witness: No, sir.

Mr. Bollinger: Mr. Emerling, to develop that a little further, suppose your father and Mr. Van Os were in a meeting, could you tell which one or not?

A. I couldn't tell, no.

Q. So there were many instances you wouldn't know by one specific person? A. I can't recall any.

Q. Mr. Emerling would normally go in and Mr. Van Os would participate? A. Yes, sir.

Q. So as a result of the meeting you would not then go to Mr. Van Os, you would proceed with the particular——

A. I don't understand you.

Q. Suppose Mr. Van Os and Emerling and yourself met and as a result of the meeting it was decided to order services, would you then go back to one of them after the meeting? A. No, sir.

Q. You would go direct to the purchasing agent and start the procedure to get the parts ordered? A. Yes, sir.

Q. So you can't say specifically whether it was Mr. Van Os or your father who would make the order to get the tickets made out? A. Yes, sir.

Q. Again discussion? A. Yes, sir.

Q. Can you say whether these were ordered that way or through some specific person? A. No, sir.

Q. Very possibly these came about as a result of the meetings? A. Yes, sir.

Mr. Van Os had authority to approve yellow requisition forms. Also my father, and the accountants. There would be a number of persons in the plant with authority to approve and sometimes the approval was a mere formality. The corporation PEMCO is out of business because we went broke when the government failed to pay us the money they owed us. They owe us $177,766.00.

VERNON CARRERAS testified as follows:

Direct Examination, by Mr. Boecker.

I was employed by Mr. Charles G. Emerling in April of 1947 as an accountant for PEMCO and served in that capacity until August of 1952. I observed Mr. Ebeling come into the office occasionally and he usually saw Mr. Emerling or sometimes Carl Emerling. I handled no transactions between the company and Mr. Ebeling other than making up checks in payment to Manchester based upon paper records brought to my attention. I was the company accountant when the firm of Heckman & Schopp were employed to do auditing. Mr. Emerling made the

statement that they were employed to find the costs of particular contracts. There was a contract on which the government cost was apparently low. Mr. Emerling wanted to get another version of it so he employed Heckman & Schopp to do a special audit.

Mr. Boecker: Do you recall ever hearing any statement by Carl Emerling regarding his activities in connection with the company records relating to the Ordnance work?

Mr. Bollinger: Same objection.

The Court: Sustained.

Mr. Boecker: I submit it is admission of co-conspirator.

The Court: You haven't proved any conspiracy yet.

Mr. Boecker: I submit the admission is part of the circumstantial evidence.

The Court: The rule is well established you can't prove the admission of one conspirator until you have proved the conspiracy. Is there any evidence here of a conspiracy?

Mr. Boecker: Well, I submit there is.

The Court: I don't agree with you. Objection sustained.

Mr. Boecker: That is all.

Cross-Examination, by Mr. Bollinger.

I was not with the company at the time the cost statement, Exhibit 2, was prepared.

WALDEN GREEN testified as follows:

Direct Examination, by Mr. Boecker.

I am a special agent of the Federal Bureau of Investigation and participated in the investigation as to the case on trial. In connection with such investigation, I made a comparison of the purchase orders contained in the numerical purchase order file of PEMCO, by comparing the wording on Plaintiff's Exhibits 24, 25 and 26 with

other purchase orders in the file. I found that these exhibits were purchase orders issued to Manchester. Each one is dated April 16, 1952, and each contain the wording, "Perform operations" and a group of numbers "as per route sheet", and I reviewed the numerical file of purchase orders to determine the purchase orders that had that wording. That specific wording, "as per route sheet" appears on these three purchase orders and only one other company in the entire file of purchase orders, a total of 15 purchase orders. The numerical purchase order is Exhibit 13 and the first order in the file is numbered 5683 dated 9/6/50. The last one is numbered 12459 dated 12/22/52. The other purchase orders issued to subcontractors would refer to "as per instructions", "as per drawing", "as per blueprint", "as per specification".

Cross-Examination, by Mr. Bollinger.

I do not know how many times the words, "as per drawing" appear in the purchase file. I don't know how many times the words, "as per specifications" appear in the purchase file. I don't know how many times the words, "as per our sketch" appear in the purchase file. The only thing I ever compared was the words, "as per our route sheets".

Cross-Examination, by Mr. Duggan.

From my examination I have discovered there was no particular formula used. They used blueprints, drawings, route sheets, sketches, and instructions, and I found all those methods and I found others besides those three exhibits that referred to route sheets.

JAMES TALLEY testified as follows:

Direct Examination, by Mr. Boecker.

I am a special agent of the Federal Bureau of Investigation and in connection with my official duty, I interviewed Joseph Mary Ebeling. I interviewed him on October 5th and 6th, 1954 and December 16th and 20th, 1954. On October 5th and 6th, Agent Green and I went to see Mr.

Ebeling and I informed him that I was investigating an allegation to the effect that he had inflated invoices that he had submitted to PEMCO, that he had also submitted invoices for work which Manchester had not done. I told Mr. Ebeling that I would like to review some of his records and that he didn't have to show them to me if he didn't want to, but he gave me voluntary written consent to examine those records.

On October 6th we had an interview with Mr. Ebeling about the circumstances of the allegations. At that time I told Mr. Ebeling he didn't have to talk to us if he didn't want to and anything he said could be used against him. He said he had nothing to hide, he had done nothing wrong and he didn't see why he shouldn't answer our questions. I asked Mr. Ebeling if he had submitted any invoices to PEMCO for work which was not done and he assured me that such a thing had not happened. He said that if it had happened, he would have known of it. He said that he was the manager of Manchester, that he was no machinist himself, he was not familiar with machine practice, that he did not do any of this work himself. He said that he had no other facilities for doing the work than his plant at St. James, Missouri, and he said he hadn't subcontracted any of the work for which he had received purchase orders from PEMCO. I talked to Mr. Ebeling again on December 16th and on December 20th. On the interview of December 16th, I was accompanied by special agent Kirkpatrick and Mr. Ebeling was accompanied by his attorney, Mr. John Casey. The same points were discussed as on the previous interview. I asked him if he hadn't told me that if he had submitted invoices for work not performed to PEMCO, he would have known of it and he said he had no recollection on this occasion of having made that statement.

On either December 16th or December 20th, Mr. Ebeling told me he was the one in complete charge of the plant even though he was away from it for extended periods, that a Mrs. Marguerite Fulton, its owner, had nothing to do with its operations, that he was familiar with or at least could handle a typewriter and had made out some of the invoices and possibly had made some of the shipping tickets that are related to this case. On December 16th

I asked Mr. Eberling if he could identify handwriting on certain of the shipping tickets that I had found in the files of both PEMCO and Manchester. There is a corresponding copy of the shipping ticket in the files of both concerns.

Mr. Boecker: Now let me hand you what has been marked in evidence Plaintiff's Exhibit 27. Can you identify Exhibit 27?

A. This is a copy of a shipping ticket dated April 28, 1952, on the form of Manchester Machine Company, indicating a shipment to Production Engineering & Manufacturing Company for 400 adapters on Job 9101. I asked Mr. Ebeling if he had written this shipping ticket, and upon examining the handwriting he said he had, though he had no independent recollection of having done so. And on the reverse of this shipping ticket he wrote, in my presence, "The handwriting on reverse of this ticket dated April 28th is mine," and he signed his name, Joseph M. Ebeling, Jr.

Q. Take Exhibit 27 you have just described and let me hand you a number of papers marked various parts of Exhibit 17. Does Exhibit 27 correspond to some of the parts of 17?

A. Exhibit 27 appears to be the duplicate copy of Exhibit 17-E. And Mr. Ebeling advised that he had written both of these documents, one being a duplicate of the other, but the one he made the notation on was the one that had come from Manchester's own file.

Mr. Boecker: May I pass those exhibits to the jury?

Mr. Bollinger: Same objection with defendant Emerling, no connection shown.

The Court: Admitted only to defendant, Joseph M. Ebeling.

(Which said exhibits were passed to the jury.)

Mr. Boecker: Mr. Talley, I will hand you what has been marked in evidence in this case, Exhibit 28. Can you identify that?

A. Exhibit 28 is a similar shipping ticket on the form of Manchester Machine Company, indicates a shipment to Production Engineering & Manufacturing Company, dated

April 10, 1952. It is for 350 housings, and it gives the part number and has the receiving stamp of Production Engineering & Manufacturing Company on it.

Now, on the reverse of this shipping ticket, Mr. Ebeling, at about the same time he made the other notation, wrote in handwriting on the reverse of this ticket dated April 10th, "is mine" and signed "Joseph M. Ebeling, Jr." He again said that the handwriting was his, but that he had no independent recollection of having signed it.

Q. Can you relate 28 to any portion of this Exhibit 18 relating to a purchase order for that part, housings?

A. Exhibit 28, which I found in the files of Manchester Machine Company, appears to be the duplicate of Exhibit 18-E, which I found in the files of Production Engineering & Manufacturing Company, and Mr. Ebeling told me that he had also written this document, but that he had no independent recollection of having done so.

Mr. Boecker: I would like to offer Exhibits 27 and 28 at this time.

The Court: Be received as to Defendant Ebeling.

(Which said Exhibits 27 and 28 were received in evidence.)

Mr. Boecker: May I pass them to the jury?

The Court: You may.

Mr. Bollinger: At this time I ask the court to instruct the jury they are merely to Ebeling and not——

The Court: The exhibits you are examining are admitted only as to defendant Joseph Mary Ebeling.

(Which said exhibits were passed to the jury.)

Mr. Boecker: Mr. Talley, did Mr. Ebeling, the defendant, make any statement to you on this occasion about the nature of his relationship with Mr. Emerling?

A. I believe on the occasion of the last interview I described, on December 20th, he said he had known Mr. Emerling for about five or six years before he started getting work from Production Engineering & Manufacturing Company, and that he and Mr. Emerling had grown to be very friendly, they had visited in each other's homes, they

had taken vacation trips together to Canada and Florida and——

Mr. Boecker: I think that is all.

Cross-Examination, by Mr. Duggan.

I am an accountant. I studied accounting for three years. Mr. Ebeling told me he had not rendered any false or fictitious invoices. All of the papers referred to in my testimony were found either in the files of PEMCO or Manchester.

JAMES HEMPHILL testified as follows:

Direct Examination, by Mr. Boecker.

I am a tool and die maker and shop superintendent at the present time. I was formerly connected with Manchester and worked for Joseph Mary Ebeling from December of 1950 until March of 1952. During the time of my employment, I was directly responsible to Joe Ebeling. My duties were the supervision of the production of parts that we were making for PEMCO and other companies. I was in charge of the entire production. Manchester did not make or perform any operations on the physical objects marked Exhibits 6, 7, and 8 while I was there. I usually made out shipping tickets and delivered parts to PEMCO and had my shipping tickets signed and delivered the signed copies to Mr. Ebeling's office and they in turn made out the invoices. From time to time I drove the truck to PEMCO with work. I received many orders from Mr. Ebeling. I did not receive any orders relating to a piece as an adapter or a housing or a striker. I left the employ of Manchester approximately the first two weeks of March, 1952.

Cross-Examination, by Mr. Duggan.

Mr. Duggan: Your recollection is, Mr. Hemphill, that you left there then around March 15, 1952?

A. That is right.

Q. And if it should develop that these parts were all ordered after March 17, 1952, that would account for your testimony in saying that you never saw them there?

A. That is right.

Q. And that also would account for your failure to understand anything about Plaintiff's Exhibits 25, 26 and 24, since they are all dated April 16, 1952?

A. That is correct.

Q. That was after you left there? A. That is right.

Manchester had the physical equipment to make all or parts of the physical objects, Exhibits 6, 7 and 8.

DONALD RAY testified as follows:

Direct Examination, by Mr. Boecker.

I was employed as superintendent of Manchester from sometime in April of 1952 until June of 1953. There was not anyone in charge at the time I took over. There was a period of time when nobody was in charge. I do not believe that Manchester did any work on the physical objects, being Exhibits 6, 7 and 8. I did not have any transactions nor do I recall seeing the purchase orders marked Exhibits 24, 25 and 26.

Cross-Examination, by Mr. Duggan.

There were two shifts at the Manchester plant. I did not examine the work of each shift. I don't believe the work could have been done on one shift without me being acquainted with it. It wouldn't have been good machine shop practice to take one type of work off at night and put it back on in the day time, but they could have started some work at night time and finished it. We did work that was only partial performance and then sent the article back to be finished. I am not a tool and die man nor did I operate any particular type of machine. I did nothing in production and I wasn't expert enough to examine the production work to tell whether it met specifications and I made no effort to do so. I never received any orders from PEMCO. I received my orders from Mr. Ebeling. I didn't proceed to supervise work under any order made out by PEMCO, but proceeded in accordance with what Mr. Ebeling told me.

Cross-Examination, by Mr. Bollinger.

I am not a machinist or tool and die maker and have never been formally trained in that line of work. At present I operate a restaurant and tourist court. Prior to my employment with Manchester, I made a carnival device in my own shop. Mr. Emerling appeared at Manchester only once or twice while I was there. I never discussed any work with Mr. Emerling. I had nothing to do with the bidding or preparing paper work. I never saw any document of PEMCO coming to Manchester and I don't know what operations Manchester was ordered to perform.

Redirect Examination, by Mr. Boecker.

I knew what to produce because Mr. Ebeling brought out the blueprint and gave me verbal instructions of how many to produce. Sometimes we would receive blueprints through the mail and we did a good deal of our discussions of work over the telephone. I do not recall ever doing any work from the part shown in blueprint, Exhibit 3. I was employed by Machester part of the time Mr. Hemphill was there. He left when I was off the payroll. I came back as superintendent sometime during April. I wasn't in production work prior to being superintendent and I didn't pay any attention to what was going on in the shop as far as work is concerned. My testimony regarding the physical objects, Exhibits 6, 7 and 8 starts from the middle of April, 1952.

WALTER O. HECKMAN testified as follows:

Direct Examination, by Mr. Boecker.

I am a Certified Public Accountant. My firm did work for PEMCO. We were employed by Mr. Charles G. Emerling. We were employed to make up some cost statements in connection with government contracts. I delegated that work to William Birchler, a member of the firm.

WILLIAM BIRCHLER testified as follows:

Direct Examination, by Mr. Boecker.

I am a Certified Public Accountant and a member of the staff of the firm of Heckman & Schopp and designated to compile cost statements at PEMCO. We started the audit in April of 1952, finished sometime in 1953.

From the books of original entry of PEMCO we compiled the cost records of these particular Ordnance contracts and compiled them into the various categories of cost. For instance: direct labor, direct material, manufacturing expense and general and administrative, and the major portion of our work was started from the voucher register, Exhibit 10. In order to facilitate the work, we took paper similar to that present in the voucher register, Exhibit 10, and used it as a slip sheet. We inserted these slip sheets in the voucher register. On the slip sheets we earmarked the various charges of direct material and etc. and also inserted the breakdown as to which Ordnance contract they were applicable to. In addition to that, we had to take every other item of cost, even though not relevant to the Ordnance contract, and insert it on the slip sheet for the purpose of a control to be sure we had everything in. At the end of the month we made a recapitulation of the slip sheets and tied that into the total costs in the voucher book. At this point we had a recapitulation at the end of each month so that consequently at the end of the year we had to make another recapitulation of monthly totals. From that recapitulation we had to do another one whereby all the various Ordnance and civilian work done in PEMCO had to be recapped again, and at that point other items of cost such as various types of overhead, depreciation and other costs of that nature had to be inserted. From there we took it to a final recap which constituted total cost for a Ordnance contract.

Plaintiff's Exhibits 29-A, 29-B and 29-C are work papers which reflect the final result of my work with respect to compiling total costs under the contract, Exhibit 1. The figures prepared by me on Exhibits 29-A, 29-B and 29-C are the same as those appearing on Exhibit 2. (At this point the witness traced plaintiff's Exhibits 20-G, 21-A,

22-A, and 22-D, being vouchers for payment, from the book of original entry, Exhibit 10, the voucher register, through the slip sheets of the voucher register, the monthly and annual recapitulations and finally into the cost statement, plaintiff's Exhibit 2, signed by the corporation and filed with the Department of the Army, Ordnance.) (Plaintiff's Exhibits 2 and 29 were offered and received in evidence. Exhibit 2 is the statement of costs filed by PEMCO with the Department of the Army, Ordnance, St. Louis Ordnance District, certified January 15, 1956, by Carl Emerling, Executive Vice President of the corporation and bearing a received stamp date of January 16, 1956, by the Ordnance District. The statement of costs contains the costs of the corporation to manufacture mortar conversion kits and component spare parts under the contract reflecting the costs of direct labor, direct material, manufacturing overhead, general and administrative expenses and profit for the calendar years 1951 and 1952. Exhibits 29-A, B and C are the accountants' work papers which compiled the total costs of performance under the contract and are the basis for the statement of costs finally submitted.)

Cross-Examination, by Mr. Bollinger.

In connection with the audit, I had contact from time to time with Mr. Emerling, but it became very technical and he admitted that if we would discuss certain things with him, he wouldn't understand the technicalities in compiling the cost and he left it entirely up to us. Mr. Eberling gave us a free hand to examine the books, records and documents of the corporation. Ninety-nine percent of our work was done in the corporation's offices. Mr. Emerling had nothing whatsoever to do with the preparation of plaintiff's Exhibit 2 or plaintiff's Exhibit 29. Each account payable voucher was the documentary evidence we used in making our audit and each one of those documents were handled by the insertion of a code number which designated the contract involved and that contract control number. The company bookkeepers had the duty of inserting the proper code numbers and if any were inserted in error, it would necessarily be an error in the cost statement. This is by virtue of the fact that the au-

ditors went strictly from the account payable voucher and the control number stated thereon. There is basically no way of being absolutely certain whether or not the work performed on these invoices is properly charged to the contract in issue.

Cross-Examination, by Mr. Duggan.

To the best of my knowledge, I have never met Mr. Ebeling nor talked to him on the telephone. I was not sure who he was when I received my subpoena. I never discussed any of the bills that Manchester rendered to PEMCO with Mr. Ebeling. We had discussions with Mr. Kirk and Air Force auditors with regard to technicalities of the breakdown of the manufacturing and administrative pools. I don't think you will ever get two accountants to wholly agree 100%. I don't recall being questioned about any specific invoices. I have had no specific instructions from the Air Force, Mr. Kirk, or any other governmental agency, including the FBI, to deduct the invoices in question and we have not done so to this date.

WESLEY C. THOMPSON testified as follows:

Direct Examination, by Mr. Boecker.

My present occupation is an insurance broker. I was connected with Manchester from January 1951 to January 1954. I had no specific title. I guess you would say assistant manager. I was employed by Joe Ebeling.

Mr. Boecker: Mr. Thompson, during the course of your employment did you ever see items which have been marked Exhibits 24, 25 and 26? Did you ever see those papers? A. I did.

Q. When and where did you see them?

A. At our office at 3920 Lindell.

Q. Under what circumstances?

A. They were given to me to make out invoices for.

Q. They were given by whom? A. Ebeling, Joseph M.

Mr. Bollinger: On behalf of Mr. Emerling I would like to object, no connection shown with defendant Emerling.

The Court: Overruled.

Mr. Boecker: What, in substance, did Mr. Ebeling say?
A. He put them on my desk and told me to bill them to Production Engineering.
Q. Did you say anything? A. Yes, I questioned him.
Q. What did you say in substance?
A. Well, I asked him what the reason was for billing them.

Mr. Bollinger: I would like to renew my objection. That is a conversation outside the scope of defendant Emerling.

The Court: I make the same ruling.

Mr. Boecker: Continue in your own words.

The Court: He told you to bill them to Production Engineering, and what did you say?

The Witness: I asked him what the reason was for billing them.

Mr. Boecker: What else was said?
A. Well, he said it was all right to go ahead and bill them and he had some deal with Charley Emerling——

The Court: I didn't hear you.
A. He had a deal with Charley Emerling.

Mr. Boecker: Did you say anything about whether or not the work had been done?
A. Yes, I questioned it. It hadn't been done.
Q. What, if anything else, did you say?
A. I told him I didn't want anything to do with it and refused to make out the invoices.
Q. Did Mr. Ebeling say anything that you recall?
A. He said they were nothing to be afraid of.
Q. Did you make out the invoices? A. No.
Q. What was the upshot of that conversation?
A. I refused.
Q. What did Mr. Ebeling do then?
A. He took them into the other office and to the best of my knowledge, he made them out.
Q. What did you see and hear in the other office?

A. I just heard the typewriter going, whether he made them out I don't know.

Q. But you never made out any invoices?

A. Not on these.

Cross-Examination, by Mr. Bollinger.

Mr. Bollinger: Mr. Thompson, was the defendant, Mr. Emerling, present at any of these times you are talking about? A. Here? No, not at this occasion. • • •

Q. Did you ever have occasion to discuss with him any of the invoices or purchase orders?

A. I don't believe—there might have been an occasion on a purchase order or something like that.

I handled all the purchase orders from PEMCO and filed them in my desk. I saw the invoices I referred to the next day.

Q. You didn't actually see Mr. Ebeling prepare these invoices? A. I did not.

Q. Mr. Emerling wasn't present at this particular time, was he? A. He was not.

Cross-Examination, by Mr. Duggan.

I refused to make out the invoices. They were made out and I saw them when I entered them on the ledger. I think it was the next day.

Q. You say you refused to make out the bills?

A. That is right.

Q. Did you make any investigation? A. About what?

Q. About whether or not the work had been done?

A. In my mind, I figured it hadn't been done and knew it hadn't been done.

Q. Did you make any investigation?

A. No, I knew the work hadn't been done.

Q. Just decided the work had not been done?

A. That is right.

Q. And therefore you refused to make out the bills?

A. That is right.

Q. You could have made an investigation, couldn't you?

A. It was usually the procedure to work from the shipping ticket, not a purchase order.

Q. You could have made an investigation?

A. I don't know why I should have.

Q. Well, let me ask you this, did you accept the money?
A. The money from Production Engineering?
Q. Yes. A. It could have come in on a check.
Q. Did it?
A. To the best of my knowledge, most of it had at the time I left.
Q. When did you leave? A. January of 1954.
Q. Well, when did this money come in?
A. It would have to come in some time after the billing date which, to the best of my knowledge, was April 16th.
Q. Well, did it come in after April 16th?
A. It seems to me some of it was on the ledger.
Q. Did you accept it?
A. If it come in I did. That is, I would have banked the check or Mr. Ebeling would.
Q. And you would enter it on the books? A. Yes.
Q. And you entered these invoices on the books?
A. I entered the invoices. I was questioned by the FBI at least a half dozen times beginning in 1952. I was questioned about the invoices, but not the invoices in evidence. The first time I was questioned about invoices was sometime in 1954 after I left the employ of the company. I never told any FBI agent the invoices were right. I told them I hadn't made them out.
Q. Did you tell any of them they were wrong?
A. Not up until recently.
Q. Previous to that you had told them they were right.
A. No, I hadn't admitted it.
Q. Did you tell them that the invoices were correct or incorrect before or after you filed suit against Mr. Ebeling?
A. The invoices?
Q. Yes.
A. Long after I filed suit against him. I filed suit in February of 1954 against Joe Ebeling. The suit has been pending two years. The suit was for accrued salaries and I made a demand on Ebeling in January of 1954. My demand covered a period of time from January 1, 1951, to January 1, 1954, when I left the company. I kept all the books of Manchester. Plaintiff's Exhibits 14, 15 and 16, being checks from PEMCO to Manchester, were deposited to the Manchester accoun' I personally deposited one of the three checks.

(Plaintiff's Exhibits 24, 25 and 26 were offered and received in evidence. Exhibit 24 is the original purchase order of PEMCO, issued to Manchester, dated April 16, 1952, bearing PEMCO, No. 10250, and the word "confirmation" and calling for the performance of operations 3, 6, 7, 8, 16, 17 and 18 as per route sheet on 1200 adapters at $6.48 each for a total of $7,776.00, also bearing the signature of Roland Sahrhage. Exhibit 25 is the original purchase order of PEMCO, issued to Manchester, dated April 16, 1952, bearing PEMCO No. 10252, and the word "confirmation," and calling for the performance of operations 9, 10, 15, 16, 21, 22, 24 and 25 as per route sheet on 1200 housings at $8.24 each for a total of $9,888.00, also bearing the signature of Roland Sahrhage. Exhibit 26 is the original purchase order of PEMCO, issued to Manchester, dated April 16, 1952, bearing PEMCO No. 10253, and the word "confirmation," and calling for the performance of operations 6, 7, 8, 9, 10, 11, 12, 13 as per route sheet on 2500 strikers at $3.22 each for a total of $8,050.00, also bearing the signature of Roland Sahrhage.)

Recross-Examination, by Mr. Bollinger.

Mr. Bollinger: Mr. Thompson, in the keeping of these books and records you have just looked over by Mr. Duggan, is there an entry in there by way of disbursement to Charles Emerling personally of Manchester Machine?

A. I don't believe so.

Q. Could you examine these documents?

A. It would take an awfully long time.

Q. For the year 1952, the year in question?

A. Bring the small ledger over here. I don't remember of any.

The Court: Do you have to look through every page of that ledger?

The Witness: I don't think there was, I was just trying to check to see if there was any here. I don't believe there was.

Mr. Bollinger: Did I understand you to say these checks of Production Engineering & Manufacturing Company were properly recorded in the books and records of Manchester Machine?

A. That is right.

Q. And there were no disbursements on Mr. Emerling during 1952, according to your records.

The Court: That is what he testified to.
You are excused.

ROBERT SANDERS testified as follows:

Direct Examination, by Mr. Boecker.

My occupation is tool and die maker. I was formerly employed at Manchester at St. James, Missouri, in the capacity of machinist. Dates of my employment were from 1946 to 1953. I was employed there at the time Mr. Hemphill left as superintendent, and I was employed there when Don Ray commenced his duties as superintendent. I was also working there at the period in between. Manchester did not do any work on the physical objects marked Exhibits 6, 7, and 8 during the course of my employment. I would recognize these in the roughed-out form if not finished. There was no one in charge of the shop during the interim between the time Mr. Hemphill was superintendent and Mr. Ray came in. The men carried on their work. They knew what to do and they did it. I recall that the shop did do work on parts of the mortar conversion kit marked plaintiff's Exhibit 9.

Cross-Examination, by Mr. Bollinger.

I worked on the night shift approximately six months in 1952. There were 10 men on the day shift and 5 on the night shift. I remember seeing a part in issue in the show case in the office at Manchester. I don't recall seeing the other parts. I was told Manchester was to bid on the part I saw.

Redirect Examination, by Mr. Boecker.

If I am working on one shift, I can tell what the other shift is working on by seeing the parts when I come on and the set up of the machine.

BRUCE HUMPHREY testified as follows:

Direct Examination, by Mr. Boecker.

I was formerly employed by PEMCO and during some of that time functioned as the shipping or receiving clerk.

Q. Let me hand you PEMCO purchase order No. 10250, which is Exhibit 17, and attached to it is Manchester Machine ticket, which is marked 17-C, and has a receiving stamp on the front with the initials "H. S." Is that your writing? A. No, it isn't.

Mr. Bollinger: Now, we object. The government is trying to impeach their own witness, Mr. Harry Sanborn, for that period here.

The Court: Overruled.

The initials "H. S." appearing on Exhibit 17-E are not my handwriting. The initials "H. S." appearing on Exhibit 17-G are not my handwriting. The initials "C. E." appearing on Exhibit 18-C are not my handwriting. The initials "C. E." appearing on Exhibit 18-E are not my handwriting. The initials "H. S." appearing on Exhibit 18-G are not my handwriting. The initials "H. S." appearing on Exhibit 19-C are not my handwriting. The initials "H. S." appearing on Exhibit 19-E are not my handwriting.

Cross-Examination, by Mr. Bollinger.

I worked with Harry Sanborn. He broke me in as shipping clerk. I never had occasion to put his initials on shipping tickets. If I signed for parts, I used my own initials. The people in the plant authorized to ship and receive parts and sign for them would be the foreman, the night foreman, the day foreman, the lead man, myself, Harry Sanborn, Carl or Mr. Emerling, the purchasing agent. I was on the day shift. There was a night shift at the same time.

Cross-Examination, by Mr. Duggan.

Harry Sanborn did not authorize me to sign his name. I always used my own signature.

Redirect Examination, by Mr. Boecker.

Mr. Boecker: Of the various persons you mentioned, you mentioned Mr. Emerling and Carl and the foreman and lead man, and purchasing agent, that was Roland Sahrhage, and receiving clerk, that was Harry Sanborn, and at one time you. Of all these times, which one had the initials "H. S."? A. Harry Sanborn.

Recross-Examination, by Mr. Bollinger.

Mr. Bollinger: How about the people I just read to you?

A. They worked in the plant. I don't know if it would be possible for them to receive goods.

Q. Any one of the H. S.'s? A. It wasn't their job.

Q. They could have. A. It would be highly irregular.

Q. Do you know whether or not Mr. Harry Spadoni was a lead man?

A. No, I don't. Russell Young was the man I was referring to.

Q. Do you know whether or not Mr. Harry Spadoni was the night foreman? A. No, he wasn't.

Q. Was he the night lead man? A. Not while I was there.

Q. Mr. Harry Sloder? A. No.

Q. Night foreman? A. No.

Q. How can you say Harry Sanborn——

A. I didn't say that, I said the people named—Harry Sanborn.

Q. I just named a bunch of people.

A. The people that were authorized to accept shipping.

Q. You said lead men might and certain office personnel, is that correct? A. Yes.

Q. Do you know as to each one of those persons as to whether or not they had the initials "H. S."?

A. I know the only ones named Roland Sahrhage.

Q. He wasn't a lead man? A. No.

Q. I am talking about lead man.

A. The only lead man I know that worked there was Russell Young.

Q. You don't know how many lead men had the initials "H. S."? A. None that I know of.

Mr. Boecker: I will submit it has become argumentative.

Mr. Bollinger: That is all. (Plaintiff's Exhibit 9 offered and received in evidence. Exhibit 9 is a complete mortar conversion kit assembly, being one of those manufactured by PEMCO.)

Mr. Boecker: Government rests.

Mr. Bollinger: If the court please, on behalf of the defendants, we request to file a motion to dismiss all counts of the evidence, for the reason all evidence offered the court and jury has not been proven—first, the corpus delicti of the crime, that there is a crime in fact. They haven't proved a conspiracy, a joining or meeting of the minds in any conspiracy. The only evidence that I can see before this court is a bunch of speculations, guesswork on the part of the witnesses.

We, therefore, move that this indictment be dismissed for lack of evidence substantiating the charges contained in the indictment.

The Court: Are you through?

Mr. Bollinger: I have one more motion in the event the court wants to rule on the motion to dismiss. It would be a motion to elect each count of this indictment is based on one statement, Plaintiff's Exhibit 2. Each count of the first counts repeats the same document over and over again. The evidence has been that there were eight invoices going into the one document, but the one document is the one filed that gives this court jurisdiction.

The Court: There is two documents, isn't there?

Mr. Bollinger: Well, the first document is the contract.

The Court: Mr. Duggan?

Mr. Duggan: We are adopting the same motion.

The Court: Anything else?

Mr. Duggan: With reference to the individual counts, the first eight counts, they have not been produced here, the eight invoices. If they have I certainly have not been

able to follow them and definitely those eight invoices have not been filed with any agency of the United States Government as alleged in the indictment.

The Court: Mr. Boecker, give me the exhibit number of the invoice dated March 17, 1952, for $3,502.00.

Mr. Boecker: Plaintiff's Exhibit 20-H.

The Court: Let's see your invoice of November 10, 1952, for 28.

Mr. Boecker: Next consecutive number, 20-I.

The Court: Invoice of April 6, 1952, for $3,703.00.

Mr. Boecker: Plaintiff's Exhibit 22-B.

The Court: Invoice dated April 28, 1952, for $1,194.80.

Mr. Boecker: That is 20-J.

The Court: Invoice dated April 28, 1952, for $2,592.00.

Mr. Boecker: 20-K.

The Court: And invoice dated May 6, 1952, for $1,296.00.

Mr. Boecker: Plaintiff's 21-C.

The Court: And exhibit dated May 6, 1952, an invoice for $1,352.40.

Mr. Boecker: 21-B.

The Court: Motion to dismiss and elect overruled.

Mr. Bollinger made an opening statement on behalf of defendants. Thereupon, the defendants, to sustain the issues in their behalf, offered the following evidence:

DONALD RAY testified as follows:

Direct Examination, by Mr. Bollinger.

I was superintendent at Manchester at its plant at St. James, Missouri, which is 100 miles from St. Louis. I worked the day shift. I have seen Exhibit 6 at the plant at St. James in the showcase in the office and I saw a few

in the scrap pile. I also told the F. B. I. I saw these parts in the scrap pile. I saw Exhibit 7 at the plant at St. James, Missouri, and used a part like that as a paper weight. The parts I saw in the scrap pile were similar in appearance as the objects in evidence. Parts moved back and forth between PEMCO and Manchester. When Mr. Thompson and Mr. Ebeling came out, they sometimes brought rough parts and usually took back finished parts. They used an automobile belonging to Mr. Ebeling and carried these parts in the trunk. Mr. Hemphill had a truck that he used quite a bit. Mr. Ebeling's appearance at the plant at St. James was quite irregular. Sometimes it would be a couple of weeks and sometimes we might see him twice in one week. Mr. Thompson handled the payroll in St. Louis. The only time I ever saw Mr. Thompson was with Mr. Ebeling at the plant. I believe they were always together. Mr. Ebeling made some trips to the plant without Mr. Thompson. I had nothing to do with invoicing of finished work. I had nothing to do with the receipt of money and paying of bills.

Cross-Examination, by Mr. Boecker.

I used a part as a paper weight. From the testimony here I know that it is called a housing. If there had been operations performed, I would have known about it. I don't recall if I knew the name of the parts I saw in the scrap heap at the time. I know now it is called an adapter. I believe I would have known if there had been seven different machine operations performed on this part in the shop. I recall that some work was done on some part of this mortar device. I can point to this cap for sure, this split nut for sure, this base for sure, and then there were two other little parts.

DAVID JONES testified as follows:

Direct Examination, by Mr. Bollinger.

I live in St. Louis County, Missouri. During 1951 and 1952 I was foreman of PEMCO. My immediate superior

was Mr. Van Os. In January of 1952 the company business was located at North & South Road in University City, Missouri. There were two shifts with 175 or 180 employees. We did not have any employee definitely known as a shipping clerk. He was considered a production worker and we had in the neighborhood of 150 production workers on both shifts. We made in the neighborhood of a million parts under the contracts with the Government. During the production of the parts, authority to receive and ship parts was by the man we assigned to the shipping area, but no particular individual would be designated one way or the other. Anyone could sign for parts. The company had a truck, station wagon and jeep used for the delivery and picking up of parts. Mr. Harry Sanborn was a production worker by the company's classification and did receive parts at one time. When Sanborn was out of the plant, any of the lead men, foremen, office personnel, plant superintendent, purchasing agent, Chas. G. Emerling, Carl Emerling, and anyone that might be so designated to replace Sanborn while he was off duty, could receive parts. The company moved from North & South Road to Kingsland in early 1952 with production going on at both places at the same time. The move took approximately one month. Parts were received and shipped from both locations during this period of time. There was considerable confusion in the manufacturing department of the plant during these months. During the move, we fell behind in our production and we increased our needs for outside help to keep it going.

We had some two to six inspectors and whenever humanly possible, each operation performed on each part was inspected. There were resident government inspectors at the plant continuously. There were at least two government inspectors working in and around the inspection department at the plant. The shipping and receiving area is in the same general area as the inspection department. Every part was passed upon by a resident government inspector. I inspected many parts personally. I devised a document known as an inspection report, being Plaintiff's Exhibits 21-E and 21-F. The inspection report contains a date, part number, part name, quantity received, number of pieces O. K., number of pieces scrapped, number of

pieces to rework, and remarks, a place for inspector's signature and date.

Mr. Bollinger: Now, referring to those you have before you, what part do they refer to?

A. This one—first one refers to the adapter.

Q. Now, is anything on that familiar to you?

A. The inspection ticket is familiar, yes.

Q. Did you sign anything on that?

A. Yes, I signed the inspection ticket.

Q. Does that indicate you inspected those parts?

A. Not necessarily.

Q. Why?

Mr. Boecker: I will object to cross-examining his witness.

The Court: Overruled.

Mr. Bollinger: You may answer.

A. You asked me why my signature?

Q. Yes.

A. This paper work originated out in the shop and was picked up by the front office as being a good device to attach to the billing. My job was to, of course, see that these papers were kept up after they once got into use. My signature here indicates that these parts were in existence and these parts were inspected and O. K.'d as outlined in the report.

Q. Now, do you know whether or not final payment is in part at least based on your inspection report?

A. It is my understanding.

Mr. Boecker: I will object to a statement which apparently calls for a conclusion beyond this man's direct knowledge, he says his "understanding".

The Court: I don't know if he knows or not. If he knows, he may answer.

Mr. Boecker: I submit the form of the question should be changed.

Mr. Bollinger: All right. Do you know whether or not payment was based on the inspection report?

The Court: Payment by who to——

Mr. Bollinger: To a subcontract.

The Court: Do those papers relate to a subcontract?

The Witness: Yes, sir, they do. None other than the fact that the office required these pieces of paper to go along with the other papers of the company files.

Mr. Bollinger: Now, is that attached to what has been identified here as an account payable voucher?

A. Yes, it is.

Q. Now, the Government's Exhibit 21—you just mentioned 21-D—would you look at 21-E and I will ask you to state whether or not that is familiar to you.

A. Yes, this is also an inspection ticket.

Q. And who is it signed by? A. By myself.

Q. And what does it cover? A. This covers the striker.

Q. Is this the striker, Government's Exhibit 8?

A. Yes, that is a striker.

Q. How many parts are shown being received? A. 420.

Q. How many are shown inspected?

A. It shows 420 inspected, broken down, 417 were O. K., three of them were returned to the vendor. It says "return for rework." It says "rejected as per tags."

Q. "Rejected as per tags"? A. Yes, sir.

Q. Is that in your handwriting?

A. It is in my handwriting.

Q. Can you state whether or not you did the inspection on that?

A. As an individual item, I could not say that I did or didn't.

Q. You don't have any specific recollection with regard to making out that ticket?

A. No, the fact I make the ticket out does not mean I personally did the inspection. I may and I may not have.

Q. Look at the next one. A. This also calls for striker.

Q. Did you sign that one? A. I did.

Q. What number is that—it's on the back?

A. Is that 21-N?

Q. It is 21-F? A. Oh, 21-F.

Q. Did you sign that one? A. Yes, I did.

Q. What does that call for?

A. Quantity received, 3. Number O. K., 3.

Q. Are all those inspection reports attached to an account payable voucher? A. Yes, they are.

Q. And to whom is the account payable voucher made out to? A. Manchester Machine Company.

Q. I will show you what has been marked Plaintiff's Exhibit 22-C and ask you to state what that is, if you know.

The Court: 22-C?

Mr. Bollinger: C.

A. This is likewise an inspection report, calls for part names, strikers, quantity received, 1150, number of pieces O. K., 1143, number of pieces scrapped, 7. Remarks, overall length undersize, scrap.

Q. What do you mean by "scrap"?

A. That means they were beyond repair and at this point they were taken from circulation.

Q. They were thrown away in a scrap pile?

A. That is correct.

Q. Did you make out that ticket?

A. I would say I did, yes.

Q. Can you state whether or not you were the actual inspector to that part? A. I could not.

Q. Same circumstances as the others? A. That is correct.

Q. Now, is that attached to an accounts payable voucher? A. It is.

Q. Who is that made payable to?

A. Manchester Machine.

Q. I will show you what has been marked Plaintiff's Exhibit 22-F and ask you to state whether or not that is familiar.

A. This likewise is an inspection ticket, part name is adapter, quantity received, 600; number of pieces O.K.'d, 589; number of pieces scrapped, 11. Remarks, Scarred holes will not clean up.

Q. Who signed that? A. That is my signature.

Q. Who wrote the remarks? A. That is my writing.

Q. Does that indicate to you whether or not you inspected those parts? A. Not personally, no.

Q. That also was attached to an accounts payable voucher to Manchester? A. It was.

The Court: Anything on any of these inspection reports to indicate who did do the inspecting if it was inspected?

The Witness: When I specified I personally did not do it, being in charge of the operation, one of my subordinates.

The Court: Does it show which subordinate did it?

The Witness: No.

Mr. Bollinger: Is that an unusual practice at that period of time? A. No.

Q. It was normal and ordinary in that course of events?

A. That is correct.

Q. I will show you Exhibit 20 with attachments and refer you specifically to 20-L, M, N, O, P, Q, R and S, and ask you to state if they are familiar to you? A. They are.

Q. And what are they?

A. These are also inspection tickets.

Q. What parts do they cover?

A. The first one covers the housing, shows quantity received, quantity O.K.'d, number of pieces to be returned and reason for rejects.

Q. Were there parts rejected on that?

A. There were 30 pieces. It says, "Return with shipper."

Q. Now, looking at that entire group without going into each one of them, are they all made out by you?

A. Without thumbing through every one, there may be portions of this that were not my writing, but the signatures at the bottom are my signatures.

Q. Now, they all cover the parts here in evidence, do they not, sir? A. Yes, sir, they do.

Q. That indicates parts received and parts inspected?

A. That is correct.

As to ordering work, I would participate only as a matter of conversation to express my feeling we were getting behind at a 9:00 meeting of the so-called top brass. As a result of these 9:00 meetings, decisions were made as to ordering materials or services. Mr. Van Os, Stanley J. McClain, Roland Sahrhage, both Emerlings and any other party that might be there, attended the meetings. As a result of these meetings work was ordered. The word,

"confirmation" appearing on a purchase order was a notation indicating that the person to whom it is directed had already received verbal instructions.

A route sheet was the method of procedure to manufacture parts. They were available in the plant. I prepared PEMCO route sheets from those supplied to me by Watervliet Arsenal. The route sheets were available in the plant to anybody, including government inspectors.

Cross-Examination, by Mr. Boecker.

The operations on Plaintiff's Exhibit 26 refer to a route sheet which would refer to the route sheets prepared by the corporation. I cannot tell what operations were to be performed without having the route sheet. The same thing is true with regard to the purchase orders, being Plaintiff's Exhibits 24 and 25. The inspection report indicates to me that the parts were in the plant and were inspected. I have no knowledge as to who made the actual inspection. I have no knowledge where the parts came from. They were indicated to me as being from Manchester.

CARL EMERLING testified as follows:

Direct Examination, by Mr. Bollinger.

I am the son of the defendant, Chas. Emerling. My duties in 1952 were to oversee final delivery, packaging, finishing and shipping. At that time I was a vice president. I approved for payment bills. The procedure for payment was that an invoice would come in from the outside supplier or subcontractor. It would come to the accountant from the girl who received it. The accountant would turn it over to the purchasing agent, who would attach a copy of the purchase order, and all other pertinent matters, receiving tickets and inspection reports. It would then go back to the accountant and then come to me to check discrepancies in number of parts. I would approve for payment and give the papers back to the accountant for final distribution. I recognize my initials on Plaintiff's Exhibits 20, 21 and 22 as approving for payment. I would

ascertain the number of accepted parts before approving the voucher for payment. Thousands of these vouchers went across my desk in the year 1952. I had nothing to do with the preparation of the check issued in payment. That was handled by the bookkeeper. At least once a day we had a meeting around 9:00 in the morning for coffee. Orders for work and services came out of these meetings. The word "confirmation" appearing on Plaintiff's Exhibits 24, 25 and 26, being purchase orders to Manchester, means a confirmed order, that is, confirming a previous order given to Manchester on this job orally. I participated in the preparation of route sheets with Mr. Jones. There were five contracts involved in the making of these parts from 1950 to December, 1952. Each contract was finally completed and shipment made to the government. The government inspectors were in the plant continuously and kept an inventory control. I signed the original statement of costs, Plaintiff's Exhibit 2. It was prepared by the accounting firm of Heckman & Schopp. On final completion, parts were stored in a locked room by the government, the keys being in the possession of the resident inspector. I was named as a co-conspirator in this case.

Mr. Bollinger: Did you and your father and Mr. Dave Jones and Mr. Ebeling at any time conspire to defraud the government in connection with this contract? A. No, sir.

Q. Did you deliver adapters, strikers or housings to the government under the contract? A. Yes, sir.

Q. Every one finally delivered?

A. Contract completed, sir.

The Court: You mean the company did, not you personally?

The Witness: No, not personally, sir, no.

Cross-Examination, by Mr. Boecker.

I signed the cost statement, Exhibit 2, on the authority of either my father or Mr. Katcher, a counsel of the company at that time; not on my own authority. After the F. B. I. talked to me I had some doubts about some of the paper work I was doing as being proper. I don't recall making the statement to Mr. Carreras that I have been

doing a lot of paper work for the old man and I don't intend to go to jail. I doubt it.

Mr. Boecker: Do you say you did not make it?
A. I would say no, yes.

CHARLES G. EMERLING testified as follows:

Direct Examination, by Mr. Bollinger.

I am the defendant in this case. I live in Normandy, Missouri. My present business is consulting engineer. I have been a licensed professional engineer since 1946. I formed the corporation known as PEMCO in the latter part of 1943. The original incorporators were myself, a gentleman by the name of Pendergast and Herman M. Katcher, who was my attorney, attorney for the company and secretary of the company. The nature of our business was engineering and manufacturing of special tooling, primarily for ammunition manufacture, until the latter part of 1950, when we received our first prime contract for the government. The first contract was a bid, fixed price contract to manufacture a defense item known as a 60 MM mortar conversion kit which has been identified as Plaintiff's Exhibit 9. We received a total of five fixed price bid contracts. The contracts were awarded on the basis of competitive bidding. PEMCO was the first civilian manufacturer of these parts. We completely performed on five contracts. In 1952 there were two contracts in process of manufacturing. I was president of the company from the time of its organization until I resigned on March 1, 1954. I am not an officer or stockholder in the corporation at the present time. The corporation went broke because we couldn't collect from the government. The government owes us $173,000 and some dollars at the end of 1954. We employed subcontractors, and to the best of my recollection, it was between 40 and 50. The number of subcontractors fluctuated as our production requirements came up. When we had a heavy machine load we were compelled to subcontract more operations out. There were between 150 and 180 employees in January and February of 1952. We had two shifts steadily and occasionally a

third shift. In 1952 my son was immediately under me. The next man was Mr. Van Os. The next man down was Mr. Jones. Then there were approximately three subforemen. Mr. Carreras was in charge of the general office. He worked for me from 1945 until I fired him in 1952, when Mr. Stanley McClain took over. Persons having authority to make up yellow material requisitions would be myself, Carl Emerling, Van Os, Carreras, and the general foremen in many instances. I had nothing to do with the setting up of the routine provided for ordering materials and parts. That was set up by Army Audit of the Chicago Fifth Army Corps in the offices of the St. Louis Ordnance District. The U. S. government auditors also set up our bookkeeping system. To the best of my recollection they came from Chicago Fifth Army Corps. Our bookkeeping procedures were changed by government auditors five times during the course of these contracts. We had Army auditors on two contracts and Air Corps auditors on three contracts. They were in and out many times. Under the terms of the contract, our company was to supply the three parts in issue to the government. I participated in the preparation of route sheets along with the entire executive staff. I do not know if all subcontractors received route sheets. It would take between 75 to 90 operations to manufacture the housing, Plaintiff's Exhibit 7.

Mr. Bollinger: Mr. Emerling, did you personally have anything to do with issuing purchase orders of any nature to Manchester, do you know?

A. I do not understand your question, sir.

Q. Did you personally participate in the preparation of these documents? A. No, sir.

Q. Looking at these documents, being Government's Exhibits 24, 25 and 26, can you say who made them up?

A. Mr. Roland Sahrhage, our purchasing agent at that time.

The Court: Who?

The Witness: Roland Sahrhage, purchasing agent at that time.

Mr. Bollinger: Did you at any time instruct Mr. Sahrhage to make up those purchase orders? A. No, sir.

Q. I will show you what has been marked Government's Exhibits 17, 18 and 19, and attachments, and ask you to state whether or not you personally had anything to do with the preparation of the yellow material requisition.

A. No, sir, same answer.

Q. What does the word "confirmation" mean on the face of the purchase order, Mr. Emerling?

A. To confirm in writing, instructions that were previously issued to a supplier of required items.

I do not remember when I first met Mr. Joe Ebeling, but it was prior to these contracts. I announced at a meeting of St. Louis Tool, Die and Machine Association that we had contracts requiring assistance. As a result of this announcement, Mr. Ebeling got in touch with me. After that Mr. Ebeling's company, Manchester, received work orders from my company. Mr. Hemphill contacted me with regard to the manufacturing of parts. I made one trip to the Manchester plant at St. James, Missouri, in early 1952. I went there to take a look at the plant equipment and capacity to see what work they were capable of performing for us in connection with this government contract. I did not meet any plant superintendent there at that time. I went there with Mr. Ebeling. There was some work in process. I don't remember what work in process was there. I have helped Mr. Ebeling unload parts, but I don't know what parts.

Mr. Bollinger: Did you have any conspiracy with Mr. Ebeling to defraud the government?

A. No, sir, I did not.

Q. Did you participate with Mr. Ebeling in the participation of any false invoices of Manchester? A. No, sir.

Q. Do you know whether or not the work on these parts as ordered by PEMCO was performed? A. I don't know.

Q. Have you ever seen the Manchester Machine invoice?

A. I do not remember.

The Court: You mean you don't know whether Manchester did any work on these parts?

The Witness: I do not know. I have no means of knowing, your Honor.

Mr. Bollinger: Did you have any deals with Mr. Ebeling with regard to these parts and invoicing therefor?

A. I did not.

Direct Examination, by Mr. Duggan.

Mr. Duggan: Mr. Emerling, I show you Plaintiff's Exhibit 20-H, a bill from the Manchester Machine Company to your company under date of March 17, 1952, in the sum of $3,502. I will ask you whether or not you ever presented that bill, that exhibit, to any agency of the United States government? A. I did not, no, sir.

Q. Did you authorize any of your employees to present it to any agency of the United States government?

A. I have no recollection I authorized anybody.

Q. So, to the best of your knowledge, it was never presented to any agency of the United States government?

A. No, sir.

Q. I show you Government's Exhibit 20-I, which is a bill under date of April 10, 1952, from the Manchester Machine Company in the sum of $2,884 and ask you whether or not you presented that to any agency of the United States government? A. No, sir.

Q. Did you authorize or instruct any of your employees?

A. No, sir.

Q. To the best of your knowledge was it ever presented to any agency of the United States government?

A. I do not know.

Q. I show you Exhibit 20-J, a bill under date of April 28, 1952, from Manchester Machine Company and——

A. Same answer.

Q. Well, I wish you would let me ask the question, please. A. Yes, sir.

Q. Did you present 20-I, a bill under date of April 28, 1952, in the sum of $1,194.80 to any agency of the United States government? A. No, sir.

Q. Did you authorize or direct any of your employees to do so? A. No, sir.

Q. I will show you Government Exhibit 20-K, a bill from Manchester Machine, April 28, 1952, to your company, in the sum of $2,500, appears to be $92, and ask you whether or not you presented that to any agency of the United States government? A. No, sir.

Q. Did you direct or authorize any of your employees to present it to the United States government? A. No, sir.

Q. Mr. Emerling, I show you Government Exhibit 21-B, a bill under date of May 6, 1952, from the Manchester

Machine Company, to your company, and ask you whether or not you ever presented that bill to any agency of the United States government? A. No, sir.

Q. Did you direct or authorize any of your employees to present that bill, 21-B, to any agency of the United States government? A. No, sir.

Q. I show you Government Exhibit 21-C, a bill from the Manchester Machine Company, under date of May 6, 1952, for the sum of $196, and ask you if you presented that exhibit to any agency of the United States government? A. No, sir.

Q. Did you direct or authorize any of your employees to do so? A. No, sir.

Q. I show you Government Exhibit 22-B, an invoice from the Manchester Machine Company, under date of April 16, in the sum of $3,303, addressed to your company, and ask if you presented that bill to any agency of the United States government? A. I did not.

Q. Did you direct or authorize any employee of yours to do so? A. No.

Q. I show you Exhibit 22-E of the government, a bill of the Manchester Machine Company, under date of April 16, 1952, in the sum of $3888, and ask you if you gave that to any agency of the United States government?

A. No, sir.

Q. Did you direct or authorize any of your employees?

A. I did not.

Q. Now, Mr. Emerling, with reference to these same exhibits, Government's Exhibits 20-H, I, J, K, 21-C and D, and 22-B and E, I will ask you, sir, whether or not you have any knowledge that any of those exhibits, bills in the various amounts I have showed to you, are false or fraudulent? A. I have no knowledge of it, no, sir.

Q. Did Mr. Eberling at any time ask you to conspire to defraud the United States government? A. No, sir.

Q. Or did he ask your permission to render to you false bills? A. No, sir.

Q. And you have no knowledge of him rendering any false bills? A. No, sir, I have not.

Mr. Duggan: I think that is all.

Cross-Examination, by Mr. Boecker.

I authorized Mr. Carreras to keep the books of the company and to make up vouchers for the payment of invoices. Part of his duties were to prepare a voucher when an invoice appeared to be supported by delivery tickets and inspection reports. He acted on my authority. Payment was a routine matter. Once these invoices came into the records and had inspection reports, it was routine to voucher them and prepare them. I signed the checks. I authorized Heckman & Schopp and Mr. Birchler to make a cost statement to present to the government. I presumed it included all these vouchers and expenses. If the bookkeeping items were regular on their face, they would go through as routine. If it was regular on its face but really false, it would go through because I wouldn't know what should stop it. As president of the company, I could initial one of these yellow requisitions and Sahrhage would make out the purchase order. Mr. Van Os had authority to do that. In some cases, Dave Jones and Carl Emerling had that authority. As president of the company everything that went out was under my authorization. I did not authorize Carl Emerling to authorize the yellow material requisitions in evidence. I felt I had an honest organization of hard working, sincere people and not a bunch of crooks. The reason the company hasn't been paid is because the government is accusing me of fraud.

Redirect Examination, by Mr. Bollinger.

The F. B. I. agents were in my plant many times beginning April, 1953. I instructed my employees to give them full cooperation, answer all questions truthfully, show them anything they asked for, cooperate at any time, day or night, so as to get this sad mess straightened up.

JOSEPH M. EBELING testified as follows:

Direct Examination, by Mr. Duggan.

I live in Clayton, Missouri. From March 1, 1952, to August 1, 1952, I was General Manager of Manchester.

Mr. Duggan: Mr. Ebeling, I show you Government's Exhibit 20-B, 20-C, 20-H, 20-I, 20-J, and 20-K. All of them are bills from Manchester Machine Company to the Production Engineering & Manufacturing Company, under various dates between March 1, '52 and August 1, '52, and I will ask you whether or not you presented any of those bills or facsimiles or copies thereof to any agency of the government at any time?

A. Those are Manchester bills to the Production Engineering Company.

Q. My question was, did you present them at any time to any agency of the United States government? A. No.

Q. Did you direct or authorize any employee of the Manchester Machine Company to present the exhibits enumerated in the previous question to any agency of the United States government? A. No.

Q. I show you Government's Exhibits 21-B and 21-C, which are bills from the Manchester Machine Company to the Production Engineering & Manufacturing Company, dated May 6th of 1952, in the amount of 1,352.40, and in the amount of 1,296, and ask you whether you presented those exhibits to any agency of the United States government? A. No.

Q. Did you authorize or direct any employee of the Manchester Machine Company to present those exhibits to any agency of the United States government? A. No, sir.

Q. I show you Government's Exhibit 22-B, a bill from the Manchester Machine Co., to the Production Engineering & Manufacturing Company, in the sum of $303.25, under date of April 16, 1952; from the Manchester Machine Company to the Production Engineering Co., in the sum of $3,888, and ask you whether or not you presented those bills to any agency of the United States government?

A. No, sir.

Q. Did you direct or authorize any employee of the Manchester Machine Company to present them to any agency of the United States government? A. No, sir.

Q. Have you ever been told by anybody at any time that Government's Exhibits 20-B, C, D, F, I, J and K, and 21-C, D, and 22-B and E have ever been presented to any agency of the United States government or the United States government itself? A. No.

Direct Examination, by Mr. Bollinger.

The manufacturing plant of Manchester was at St. James, Missouri, with the office in St. Louis, Missouri. In 1952 the business was owned by a Mrs. Fulton. We started work for PEMCO in March, 1951. I had nothing to do with the actual manufacture of these parts. Mr. Hemphill was superintendent until the first part of March, 1952, which was prior to receiving work orders from PEMCO on the three parts in issue. Mr. Ray took over about the middle of April.

Mr. Bollinger: Mr. Ebeling, do you know whether or not work was performed by your company on those parts?

A. I couldn't say it was and I couldn't say it was not. I was down in St. James so little I wouldn't have any real knowledge of it this late. The parts as they are now, I know I wouldn't recognize them, because if we did work on them, they would be in a different form while we were doing the work.

Q. Did you at any time agree to conspire with Mr. Charles G. Emerling, the other defendant, to defraud the government? A. I did not.

Q. Did you at any time prepare or attempt to prepare or present any false or fraudulent invoices to Production Engineering & Manufacturing Company or any department or agency of the government? A. I did not.

Cross-Examination, by Mr. Boecker.

The invoices prepared on Manchester billhead to PEMCO would have been done by either myself or Mr. Thompson. I couldn't say which one of us did all the billing. I first saw the purchase orders, Nos. 10250, 10252, and 10253, for the housing, striker and adapter, in the mail at the office. I am not a machine man and I didn't oversee or understand about heat treating and rough turning. We had men there to do the work. I made up two of the shipping tickets in evidence which bear my endorsement on the back. I don't recall the circumstances under which they were made out.

Mr. Duggan: Defendants will rest.

Thereupon the government offered the following evidence in rebuttal:

VERNON CARRERAS testified as follows:

Direct Examination, by Mr. Boecker.

I was previously a witness in this case. In the early part of 1952, I recall overhearing a statement or a remark by Carl Emerling. The statement occurred several times after arguments between Carl and his father. He said he wouldn't go to jail to protect his father with respect to paper work by including various items that were not proper under accounting procedures to be included as costs.

Cross-Examination, by Mr. Duggan.

I never heard Mr. Ebeling's name mentioned at any time.

CORNELIUS VAN OS testified as follows:

Direct Examination, by Mr. Boecker.

I was superintendent of the company and Dave Jones was general foreman right below me. The rule with regard to using inspection report forms was that these tickets were placed on all the jobs that came in from outside sources and every lot that came in they was supposed to be inspected and the inspector that looked those parts over was supposed to sign the tickets. It was not proper for one man to inspect and another man to sign.

Cross-Examination, by Mr. Bollinger.

The inspection ticket was set up by us in the shop at a meeting. I don't know who all was in there. The ticket itself was devised by Dave Jones and me and maybe Mr. Emerling. I may have signed tickets if I looked over parts. I may have filled out portions of the tickets. I was not physically in the inspection department. I did not know who signed which ticket unless I watched. What I have

testified to is based on a supposition of what is supposed to be. No one would be able to tell if the rule of the company was followed one hundred percent.

The Court: Anything further?

Mr. Boecker: No, your Honor.

The Court: Let the record show all evidence is now completed. Government closes its rebuttal.

Mr. Duggan: I want to move at this time for acquittal of both defendants on Counts 1 to 9, inclusive, for the reason that there is inadequate proof in the evidence adduced to sustain the charge in the indictment. At this time, in the event the previous motion is overruled, counsel desires to move the government be compelled to elect as between Count 8 and Count 9.

Mr. Bollinger: We adopt in behalf of Mr. Emerling.

The Court: Overruled. Have you got your requests? • • •

(Whereupon, the following proceedings were had out of the hearing of the jury.)

The Court: There is only one item of law that I think there might be some confusion on. I think the question as to whether these invoices were a matter within the jurisdiction of governmental agency is a matter of law, and whether they were in the jurisdiction of an agency of the government, it is the duty, of course, to instruct them.

Mr. Boecker: That was my suggestion.

The Court: I don't think there is much I can relieve you on. The law is very plain, did they have knowledge.

Mr. Duggan: That all goes to the conspiracy charge. In other words, 8 is matter of law as to whether or not.

The Court: The matter is simple. I will simply instruct the jury—I will tell the jury that in view of these three statements, and the stamp that was on them, the other exhibits here, that those invoices were as a matter of law within the jurisdiction of a governmental agency.

Mr. Duggan You will tell them that as a matter of law?

The Court: The question is were they false. That is, I think, the issue in the case.

Mr. Duggan: I think they could be false and not come within the agency of the government.

The Court: They could, but I don't think the facts in this case—I think they are within the jurisdiction of an agency of the government. Do you have any cases?

Mr. Bollinger: Lowe v. United States.

The Court: Have you got the citation.

Mr. Bollinger: It is cited in the annotations.

Mr. Boecker: I can give it to you.

Mr. Duggan: 141 Federal Second, 1005.

Mr. Boecker: That is the case where a ship yard worker turned in a false time card to a company working on a government ship and held that he defrauded.

The Court: What is the citation?

Mr. Duggan: Lowe, 141 Federal Second, 1005.

The Court: I have gone on this Todorow case, certiorari denied.

Mr. Bollinger: 173 Federal Second. That is distinguishable on the facts.

Mr. Duggan: There is the Holland case, too, your Honor. That is 200 Federal Second, 678.

The Court: What is the page?

Mr. Duggan: 678.

The Court: Do you have any cases?

Mr. Boecker: No.

The Court: Members of the jury, I have got a little law matter I want to look up. If you will be more comfortable you may go out.

(Whereupon, a short recess was taken, pursuant to which the trial proceeded as follows:)

The Court: Members of the jury, it has been suggested by counsel that the arguments and my charge could not be presented this evening without keeping you late, and I don't want to do that, and they have requested the arguments and charge be put over until tomorrow morning, so I am going to excuse you at this time until ten o'clock tomorrow morning.

You may now pass out.

(Whereupon, the following proceedings were had out of the presence and hearing of the jury:)

The Court: Mr. Boecker, what is your theory on the case that you claim you have made against the defendant Emerling?

Mr. Boecker: Is is based on this, on the showing the purchase order was issued pursuant to the issuance of the material requisition, which was in the usual routine, and that underlying document was prepared by Carl Emerling, and we called Carl Emerling to show he did not do it on his own authority, but he does not recall whether his father or Mr. Van Os authorized him to, and we called Mr. Van Os to show he never did order the parts and to show that he, being an employee, rather than in a proprietary capacity, wouldn't have the interest to falsify, whereas this defendant might.

The Court: Your position is that Carl Emerling stated that either one of the two told him?

Mr. Boecker: Yes, sir, he definitely narrowed it down to those two.

The Court: Which requisition is it that you are referring to?

Mr. Boecker: Each one of them, there are three. The requisitions are items marked in evidence as Parts B of 17, 18, and 19. Of course, there is intended circumstance between the two defendants, one of personal friendship and they did deal with one another. Those supplement and, I think, are the basic facts established by Carl Emerling.

The Court: How is that?

Mr. Boecker: I say basically it is established by Carl Emerling.

The Court: What do you mean "basically"?

Mr. Boecker: I mean basically in this respect, that by a process of inductive logic we limit it down to two possibilities, then one, and I say it is supplementary facts which would not stand by themselves, but are persuasive, and that is the close relationship between the two defendants, and they did deal with one another on various occasions.

The Court: Very well. Announce a recess until tomorrow morning at ten o'clock.

(Whereupon, the following proceedings were had out of the presence and hearing of the jury:)

The Court: Gentlemen, there are two matters I think I should inform you on as to how I am going to instruct. One is on whether or not these invoices were matters within the jurisdiction of the department of the government of the United States. I shall instruct the jury that if they find that these invoices identified in each of the first eight counts of the indictment went into the books of the PEMCO Company in the amounts of the invoices entered onto their records as a cost of performing their contract and became a part of the sums which were presented to the government in Exhibit 2, then that they were a matter within the jurisdiction of the department of the Ordnance, a department of the United States government.

I shall further instruct the jury that it is necessary before the defendants can be convicted on either of the first eight counts of the indictment that on each of them that they knowingly caused these.

It is necessary as to any count before there can be a conviction as to the invoice identified in that count, that the defendants caused the invoice to be made and that they knew it was false and caused it to be made with the intention it be entered on the books of PEMCO Company, knowing its falsity and that they intended to go to the records of PEMCO Company and become a part of the total costs of performance of the contract, Government's Exhibit 1, and that they intended—the two of them—in-

tended that it should be included in the figures presented to the government agency as set forth in Government's Exhibit 2.

Before there can be a conviction on either one of the first eight counts, it is not sufficient that Ebeling alone or Emerling alone, may have known the invoice was false and intended and caused it to be entered on the books of the PEMCO Company, but that defendants both should have known of its falsity and intention of use.

Now, the balance of the charge is stereotyped.

I understand you want an hour on the side.

Mr. Duggan: Yes, your Honor. I take it your Honor wants us to put the exceptions in after the charge?

Mr. Boecker: Will you instruct on the conspiracy charge?

The Court: Yes, usual conspiracy instruction.

(Thereupon, on March 22, 1956, the following proceedings were had:)

Mr. Boecker made closing arguments on behalf of the government and Mr. Duggan and Mr. Bollinger made closing arguments on behalf of the defendants.

The Court's charge to the jury:

The Court: Members of the jury, I will now give you the charge as to the law which you will be bound by in reaching your decision on the factual issues as to the guilt or innocence of these two defendants on the nine counts of the indictment in this case.

You, as jurors, have the exclusive province and duty of determining the facts—factual issues—which are in this case, determining the guilt or innocence of these two defendants of these charges, and with that part of this trial the judge has nothing to do. It is your sole province to pass upon the weight that you will give to the testimony of each and every witness and the credibility you will give to each and every witness and the testimony as a whole.

It is my province and my sole duty to give you an instruction as to the law, and it is your duty to follow the

law as I give it to you, whether you think it is good law or should be the law or not. In other words, take the law as you receive it from me and apply it to the facts as you find them, and then as a result, you will be called upon—as a result of your finding—to render a particular verdict in this case of either guilty or not guilty on the various counts.

I might put it another way: You are twelve judges in the box—jury box—to pass upon the facts of this case, and I am one judge on the bench to pass upon the law. Neither of you, nor I, have any personal interest in the outcome of this case. We are here solely as officers of the court to perform our duty conscientiously and honestly and fearlessly, as best we can, and your duty, from the evidence in this case and so far as is humanly possible, is to determine wherein the truth lies as to these charges that have been made and preferred against the defendants in this case.

Now, this charge is given to you orally. That is the way juries are instructed in the Federal Courts. No written instructions will be given to you to take to the jury room. Some of you may have served as jurors in the state court where written instructions are given to the jury, and they take those written instructions to the jury room. That is not the practice in the Federal Courts. The Federal system is based on the assumption that it is better to give a jury a charge in lay language, so to speak, orally, and they will probably be able to understand it as laymen and carry it with them to the jury room and apply it than if a technical set of instruction is given and they take those to the jury room. So, since this instruction and charge is given orally to you, it is highly necessary that you pay close attention to it so that when you go to the jury room you can use it and apply it in determining the factual issues in this case.

I don't give you a series of charges, gentlemen. I give you one charge. It would be highly improper for you to disregard a part of this charge because you did not like it and not accept it, and then use some other part of the charge. I am sure you will not do that. The charge is given to you—and I think it suits the case—as a whole, and to disregard a part of it would not be applicable to the case.

Now, if during the course of this charge, I comment on the evidence or I say anything which you understand or construe to be a comment on the evidence, and what I say as to it or you understand me to say about the evidence—testimony of the witnesses—differs from your understanding, and your belief as to the testimony, in that respect, you disregard what I say about the testimony. That goes back to what I said awhile ago—that you are the sole judges of the testimony in this case and not me.

This indictment is in nine counts, and the first eight counts are what we call substantive counts. They charge a substantive offense. The ninth count charges a conspiracy.

Taking up first the eight counts—the substantive counts—the first count is typical. It reads as follows:

"That at all times hereinafter mentioned, Production Engineering and Manufacturing Company, hereinafter referred to as PEMCO, was a corporation engaged in manufacturing and more particularly engaged in the performance of a certain contract dated May 31, 1951, for the manufacture of mortar conversion kits, for the Department of the Army, Ordnance, a department and branch of the United States Government; defendant Charles G. Emerling was president of the said corporation; Manchester Machine Company, hereinafter referred to as Manchester, was the trade name of a manufacturing business under the management of defendant Joseph Mary Ebeling. Payments by the United States to PEMCO pursuant to said contract were subject to repricing, and such repricing was within the jurisdiction of the Department of the Army, Ordnance.

"Commencing on or about the 17th day of March, 1952, and continuing up to and including the date of the return of this indictment, within the Eastern Division of the Eastern District of Missouri, the defendants, Joseph Mary Ebeling and Charles G. Emerling, did willfully, feloniously, wrongfully and unlawfully, make and use a false writing knowing the same to contain false, fictitious and fraudulent statements and entries, in a matter within the jurisdiction of the Department of the Army, Ordnance, a Department and Agency of the United States.

"Said false writing was an invoice dated March 17,

1952, issued by Manchester for purported charges in the sum of $3,502.00, for machine shop operations on the housing of said mortar conversion kits, pursuant to a purchase order issued by PEMCO to Manchester and dated April 16, 1952. In truth and in fact the work described in said purchase order and said invoice was not performed either in whole or in part, and each and every statement and entry in said invoice was false, fictitious and fraudulent. Said invoice was furnished by defendant Ebeling to defendant Emerling and became the basis of a portion of costs contained in a statement presented by PEMCO to the Department of the Army, Ordnance, on or about January 6, 1953, for the purpose of repricing."

Now, that is Count 1. Counts 2 to 8, inclusive, are in substantially the same terms and charge an offense under the same statute, an offense in the same character, except as to each count a different invoice. The invoices were introduced in evidence and I will refer to them later. Each count describes a different invoice—that is, of the first eight counts, and each invoice is, therefore, alleged to charge and create a separate offense. I won't read the other eight counts of the indictment.

Now, that part of the indictment, the eight counts, are based on this section of the statute—Federal law—which reads as follows:

> "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statement or entry"—

shall be punished as provided in the statute.

Now, that is the statute upon which the first eight counts of the indictment are based.

Going now to the ninth count, or the conspiracy count, it charges:

> "Commencing on or about the 17th day of March, 1952, and continuing up to and including the date of the return of this indictment, within the Eastern Division of the Eastern District of Missouri, the defendants, Joseph Mary Ebeling and Charles G. Emerling,

did willfully, feloniously, wrongfully and unlawfully combine, conspire, confederate and agree together and with the aforesaid PEMCO, a corporation, one David Neal Jones, one Carl Emerling, and with divers other persons whose true names and identities are to the grand jurors unknown, to defraud the United States by preparing, keeping and presenting false records and accounts of PEMCO's costs of the performance of said contract dated May 31, 1951,"

and that was Government's Exhibit 1,

"and particularly the costs of purported subcontracts under said contract entered into between said PEMCO and said Manchester, to the end that PEMCO's said costs would be wrongfully increased.

"It was a part of said conspiracy that defendants would cause purchase orders on PEMCO forms to be issued, to falsely indicate allotments of subcontract work by PEMCO to Manchester under said contract of May 31, 1951. It was further a part of said conspiracy that defendants would cause false material requisitions to be prepared on PEMCO forms, to falsely indicate that material was being requisitioned by PEMCO for the performance of work called for in said purchase orders. It was further a part of said conspiracy that defendants would cause false shipping tickets to be prepared on PEMCO forms, to falsely indicate that material was shipped by PEMCO to Manchester for the purpose of said subcontract work. It was further a part of said conspiracy that defendants would cause false shipping tickets to be prepared on PEMCO forms, to falsely indicate that material was shipped by PEMCO to Manchester for the purpose of said subcontract work. It was further a part of said conspiracy that defendants would cause false inspection tickets to be prepared on Manchester forms, to falsely indicate that finished work pursuant to said subcontracts was delivered by Manchester to PEMCO and inspected. It was further a part of said conspiracy that defendants would cause false invoices to be prepared on Manchester forms, to falsely indicate that finished work pursuant to said subcontracts was delivered by Manchester to PEMCO and inspected.

> It was further a part of said conspiracy that defendants would cause false invoices to be prepared on Manchester forms, to wrongfully charge PEMCO for work purportedly done by Manchester pursuant to said subcontracts."

And then this follows: "To effect the object of the conspiracy, the following acts were performed," and then there is some nineteen overt acts charged. The first eight of the acts refer to the charge of the government that Joseph Mary Ebeling made out the false invoices that are referred to in the eight substantive charges referred to a moment ago, and then others, such as David Neal Jones and Carl Emerling, are charged with performing certain overt acts.

Now, that count of the indictment is based upon a Federal statute which reads as follows:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to affect the object of the conspiracy,"

shall be punished as provided in the statute.

Now, I want to go back for a moment to the first eight counts of the indictment. You have noticed, of course, that each of the eight counts—what I called your attention to—charges use of a false writing and that the defendants knew the writing to contain false entries, and here is the gist of those counts: In a matter within the jurisdiction of the Department of the Army, Ordnance, a Department and Agency of the United States, and then in each count there is identified as the false writing referred to, a certain invoice.

Now, of course, if these invoices did not ultimately become a matter within the jurisdiction of the Department of the Army, Ordnance, a department and agency of the United States, there wouldn't be any Federal offense here, no matter how false the invoices might have been.

Now, on the subject as to whether the invoice is referred to in each of the first counts of the indictment, was a matter within the jurisdiction of the Department of the Army, a Department of the United States.

If you believe that the invoice referred to in each of the first eight counts of the indictment went into the books and records of the Production Engineering & Manufacturing Company, and was there recorded as a production of manufacturing cost item in the performance of the prime contract, Government's Exhibit 1, and was included in the audit, as testified by the witness Birchler, and included in the price of performance, as submitted to the Department of the Army Ordnance, a branch of the United States government, for repricing as shown in Government's Exhibit 2, then as to such invoice or invoices, they were a matter within the jurisdiction of the Department of the Army Ordnance, a Department and Agency of the United States.

It was not necessary that the invoices themselves be physically presented or exhibited to the Department of the United States government.

You will observe that the indictment charges the two defendants with jointly doing the acts charged in each of the first eight counts.

Before you can find the defendants guilty on either of the first eight counts of the indictment you must find the defendants, each knowingly and intentionally caused the invoice referred to and identified in the court to be made, and thereafter the defendant knowingly and intentionally caused the invoice to be used as an item of cost in executing the prime contract, Government's Exhibit 1, with knowledge of its falsity, and knowingly and intentionally caused the invoice to be used as a sum going to make up the total sum presented to the Army Ordnance of the United States Government, and that they intended and knew it was included in the figures presented to the government agent as set forth in Government's Exhibit 2.

And unless you so find your verdict will be not guilty as to that count or counts that you make that finding.

That defendant Ebeling or Emerling, separately, may have known an invoice to be a false writing is not enough to convict; it is necessary that you find that the knowledge of falsity and intent as to use in a matter within the jurisdiction of the Department of the Army, Ordnance, be known and intended by both defendants, before you can convict on either of the first eight counts of the indictment.

It is not necessary, gentlemen, that the government lose any money, if you should find that those invoices were false and were knowingly used by the defendants, as I have just outlined to you. The purpose of the statute is that in governmental business transactions of this kind, it is to keep false writings from being presented to the government as a business matter in the closing of the transaction with respect to the amount of money as in a case of this kind that may be due or not due to the contractor.

Now, referring to the ninth count, the conspiracy count that I read to you, the indictment in the ninth count charges the defendants, with others, entered into a combination or conspiracy to commit offenses against the laws of the United States, namely the section of the United States Code that I read to you.

I want to tell you so you will thoroughly understand what the requirements of the law are on the subject matter of the conspiracy as set forth in the ninth count of the indictment. The term conspiracy as used in the statute which was read to you and as used in the ninth count of the indictment in this case has no complicated or unusual meaning. A conspiracy means an understanding or agreement between two or more persons to accomplish an unlawful act.

In this case, it was charged the unlawful purpose or the act they were seeking to accomplish, was to defraud the government. In order to create a conspiracy, there must be not less than two persons to the understanding or agreement. There is no limit on the number in excess of two. There is a minimum of two required because, obviously, one individual could not conspire or agree to come to an understanding with himself.

So, if two or more persons confederate, agree or have a common understanding for the accomplishment of an unlawful purpose or act, that is, to commit an offense against the laws of the United States, then those persons so agreeing or having such understanding, are conspirators and the agreement or common understanding is a conspiracy.

To constitute a conspiracy it is not necessary that two or more persons should meet together or enter into an

express or formal agreement of an unlawful nature or scheme, or that they should directly, by words or in writing, state between themselves or otherwise what the unlawful plan or scheme is to be or the details thereof, or the means by which the unlawful combination is to be made effective. Seldom do conspirators so conduct the enterprise and seldom are conspirators open to such direct proof.

It is sufficient to constitute a conspiracy if two or more persons in any manner or through any contrivance positively come to a mutual understanding to accomplish a common and unlawful design. I repeat: When an unlawful end is sought to be effected by two or more persons and two or more persons actuated by the common and unlawful design or purpose of accomplishing that end, work together in any way in furtherance of the unlawful scheme, every one of such persons so working together with a common design and purpose becomes a member of the conspiracy.

In order to warrant you in finding a verdict of guilty against the defendants or either of them on the ninth count of the indictment, first it is necessary that you be satisfied beyond a reasonable doubt that a conspiracy as charged in the ninth count of the indictment was entered into between the defendants and other persons, if you so find, but it must have been entered into by the defendants and each of them to violate the law of the United States in the manner described in the ninth count, and then, second, you must find that one or more of the acts, the overt acts described in the ninth count of the indictment, was committed by a party to the conspiracy and during the existence of the conspiracy.

Of course, as to either defendant against whom the evidence does not establish guilt of the conspiracy charged beyond a reasonable doubt, as I have outlined, then as to that defendant or defendants, you cannot convict on the ninth count. Under the charge made on the ninth count of the indictment, the conspiracy constitutes the offense and it must be made to appear from the evidence beyond a reasonable doubt before either of the defendants can be convicted that such defendant was a party to the conspiracy and unlawful agreement charged, and that an

overt act was committed by one or more of the conspirators during the conspiracy.

Of course, as to either defendant against whom the evidence does not establish guilt of the conspiracy charged beyond a reasonable doubt, as I have outlined, then as to that defendant or defendants, you cannot convict on the ninth count. Under the charge made on the ninth count of the indictment, the conspiracy constitutes the offense and it must be made to appear from the evidence beyond a reasonable doubt before either of the defendants can be convicted that such defendant was a party to the conspiracy and unlawful agreement charged, and that an overt act was committed by one or more of the conspirators during the conspiracy.

Each party, to be a conspiracy, must be actuated by an intent to promote, a common design. If persons knowingly pursue by their acts the same unlawful object, on one act and the second another act, and all with a view to the act they are pursuing, the conclusion is warranted they are engaging in conspiracy to effect that object.

Co-operation in some form among those charged must be shown. There must be intentional participation in the transaction by the defendants with a view and purpose to further the common design. If a person, understanding the unlawful character of the understanding, encourages in any manner known to the other and with a purpose to forward the scheme, assists in its prosecution, he becomes a conspirator.

In determining whether or not a conspiracy was formed or existed, you should take into consideration all the facts and circumstances admitted in evidence, which includes evidence of overt acts, if you find any, and from that determine if the evidence in your mind so warrants, decide whether or not a conspiracy was formed within the meaning of the statute read to you.

Now, I will give you the indictment to take with you to the jury room. There are nine counts of the indictment, and I am giving you the indictment to take with you solely for the purpose of you identifying and having present with you for the purpose of deliberations, the nine charges. But, keep this in mind, the indictment and no count in the indictment constitutes any evidence of

any character of guilt of either the defendants, and should not be considered by you, because it is an indictment returned by the grand jury, as any evidence of guilt against either of the defendants in this case. It is given to you solely for the purpose of you having with you in the jury room the identification of the various charges and the details of those charges, so that you can intelligently deliberate and pass upon the charges.

You will have noticed I have used the terms in reading the indictment, and also the statute, "willfully," "knowingly," and "feloniously." As used in the indictment and the statute, "willfully" means intentionally, not accidentally, and carries with it the idea of knowledge of the criminality of the act alleged to have been committed by the defendant.

The word "knowingly" means that state of mind wherein the defendant was in possession of facts from which he knew or was aware he could not do the act wherein he stands charged.

The word "feloniously" means wrongfully, wickedly, and against the admonition of the law and also carries with it the idea of deliberate intent to do a wrongful act. It includes unlawful, because a thing cannot be done feloniously without being done unlawfully.

Each of the defendants in this case, gentlemen, is presumed to be innocent of each of the charges contained and set forth in the indictment. That presumption is not a meaningless phrase to be cast aside. That presumption applies to every element of the charge against the defendants and each of them and remains with the defendants and each of them until the evidence in the case overthrows it and you are satisfied beyond a reasonable doubt that a defendant is guilty as charged in each and every count of the indictment.

There is no obligation upon the part of a defendant to prove his innocence. The burden of proving the defendants' guilt rests upon the government, and that burden never shifts and that burden could not be sustained until the proof offered by the government convinces you beyond a reasonable doubt of the guilt of the defendants, or the defendant.

A reasonable doubt, as that term is used in this charge, means a doubt based upon reason arising out of the evidence or lack of evidence in this case. A reasonable doubt is such a doubt as leaves a juror's mind so undecided he does not have an abiding conviction of the defendant's guilt after a full and fair consideration of all the evidence, that is, a settled conviction of guilt which the juror believes will remain unshaken by future thought and reflection.

A reasonable doubt is such a doubt as would cause a reasonably careful and thoughtful and prudent person to hesitate to act if confronted with a question of importance concerning his own affairs, but a reasonable doubt does not arise solely from mere conjecture or whim, nor from reluctance to convict through feelings of sympathy or mercy.

A reasonable doubt is a conscientious belief arising only after calm, dispassionate and impartial consideration of all the evidence that there is a reason to doubt a defendant's guilt.

Let me say to you further on this subject, it is not necessary for the government to prove the guilt of a defendant beyond all possible doubt. If that were the rule few men, however guilty they might be, would be convicted. In this world it is practically impossible for a person to be absolutely and completely convinced of any fact which by its nature is not susceptible of mathematical certainty. In consequence, the law is such that in a criminal case it is enough that defendant's guilt be established beyond a reasonable doubt and not all possible doubt.

I think when you consider the evidence in this case, gentlemen, that the issue is a comparatively simple one. Take the first eight counts of the indictment—they refer to invoices which, if you require them or want them when you go to your jury room, they will be made available to you by giving a note to your bailiff, who is just outside your door.

The government's theory of the case, is, as I understand it, that the basis of this charge started when those three statements were given to the defendant Ebeling. How he got them wasn't developed, but in the office of Ebeling was a man by the name of Thompson, who testified, brought

here by the government, as I recall his name, and he testified that the three requisitions or statements—by what term you might want to use—were given to him by Mr. Ebeling, and Mr. Ebeling told him to make out the invoices for those statements and Thompson said that he refused to do it, according to the government's testimony, and that he refused to do it because the parts called for by the three statements had not been delivered.

He testified that Mr. Ebeling told him that he had an agreement or understanding with Charles Emerling, the other defendant, and that it would be all right, but Thompson said he still refused to do it, and that Mr. Ebeling then took the three statements into his office and that he thereafter heard the typewriter. He didn't say that he saw Mr. Ebeling make out these invoices, he testified he didn't know who made them out, as I recall it. My understanding and recollection is that when Mr. Ebeling was on the stand he did not deny that conversation that was testified to by the witness Thompson, but he did state that he had never made any false invoices and that he did not know and had no knowledge of any false invoices having been made on behalf of Manchester, the company he operated, and presented to the PEMCO Company.

Then there was testimony as to workmen down at the St. James plant of the Manchester Machine Company. Donald Ray, I think it was, who was superintendent of the St. James plant during the period involved in this case, testified that no work was done at that plant on those three pieces of the gun that has been offered in evidence, and about which we have been hearing testimony for several days, so it is the position of the government that these parts were never manufactured by the man Ebeling as the Manchester Machine Company, and that these invoices were false and that they were put into the records of the PEMCO Company in order to swell the cost of the production under this contract so that they would have a larger cost of production when they went to present the matter for repricing to the government.

Now, on the other hand, it is the position of the defendants, as I understand their position, that they were engaged in making a large number of parts for the government, that is, the PEMCO Company, particularly, as I recall it, close to a million parts, that they had three prime

contracts, they had various subcontractors, and Mr. Emerling says he doesn't recall the details of subletting contracts, the period of time that has passed—some three or four years—but that there was nothing false in connection with his books or records or any of the matters that he had anything to do with or had any knowledge of in his company.

Mr. Ebeling, the other defendant, testified to the same effect. Mr. Ebeling says he was not down to the St. James plant very often, that he handled the records as they went through his office, some of them, and that he knew of no false records. The records were offered in evidence, as to—according to the defendants' theory, the manufacture of three parts at the St. James plant.

So you are going to have to determine wherein the truth lies between these two contending issues of the government and the defendants in this case. Pass upon the credibility of the witness and the weight you give to their testimony. In doing that, consider the interest or lack of interest of any witness in the outcome of this case. Consider whether the witness has any bias or feeling or not. Consider the witness' relationship or friendship to any of the parties in interest or a defendant. Consider the witness' means of knowledge of the fact he testifies to or professes to know or understand, the chance or opportunity of the witness knowing the facts about which he testifies. Is the testimony reasonable or unreasonable? Whether the witness has made contradictory statements or not about material matters involved in the case, and use any other standard that in your good judgment and sound common sense you should apply in determining the truth and the credibility, and the weight you give the testimony of each of these witnesses.

If you believe that any witness has willfully testified falsely to any material fact in this case, then you are at liberty to disregard the whole as well as that part of that witness' testimony you believe was false.

When a defendant in a case of this kind takes the stand, which a defendant has a perfect right to do, the defendant is subjected to all the obligations of a witness and the defendant's testimony is to be treated like the testimony of any other witness. That is to say, it will be for you to determine, remembering the matters of the defendant's testimony and the manner in which the defendant gave it,

the defendant's cross-examination, and everything else in the case, whether or not such defendant told the truth, and again, it is for you to remember that you have a perfect right to do so, and it is your duty to do so, to recall the very grave interest that a defendant has in the outcome of this case. That does not mean that whenever a person is accused of a crime and takes the stand in his own behalf that he will naturally commit perjury, but, of course, as a defendant places himself as a witness, a defendant stands like any other witness, but defendant's interest or bias or anything else that may affect a defendant's testimony is a matter which, of course, the jury may take into consideration.

I want to give you the law on the subject of circumstantial evidence, because the evidence in this case is both of a direct nature and circumstantial in character. I make a statement to you as to how I came down in town this morning. That would be direct evidence. That statement could be true or it could be false. Direct evidence can be as unreliable as any other type of evidence. On the other hand, circumstantial evidence may be as persuasive and as conclusive as the post positive, direct evidence. Direct evidence is illustrative of where a witness says, "I saw this or that. I was there, I saw it."

Circumstantial evidence is where a party undertakes to prove a fact as a deduction or inference from some other fact or facts shown in evidence. Circumstantial evidence is that character of evidence which tends to prove a disputed fact by proof of other facts which have a legitimate tendency to lead the mind to a conclusion that a fact exists which is sought to be established.

There is a great deal of conflict and always has been as to the relative value of direct or circumstantial evidence in the lay mind. So far as the law is concerned, you can prove a cause either by direct or circumstantial evidence. Circumstantial evidence is legal evidence. A jury must act upon circumstantial evidence the same as if it were direct evidence when it is satisfied by such evidence beyond a reasonable doubt. The weight to be given to circumstantial evidence can be stated very simply and the rule is this: To the extent that the government's proof in this case is circumstantial, those circumstances relied

upon to convict must be consistent with guilt alone and not consistent with innocence or the balanced hypothesis of either guilt or innocence.

In order to justify a jury in finding a verdict of guilty based entirely or substantially on circumstantial evidence, the facts sought to be established by circumstantial evidence must not only be consistent with the guilt of a defendant, but they must be inconsistent with any other reasonable hypothesis that can be predicated on the evidence.

Under the law, the guilt of each of the defendants under the charges set forth in the indictment could be shown by circumstantial evidence. Whether it has or not is for you to determine in this case. Before you can agree on a verdict as to either of the counts of the indictment, it is necessary for the twelve of your gentlemen to agree. In the event that you find a verdict of guilty on one or more counts of the indictment, that will be the end of your work. In this court, the matter of punishment is a matter solely for the court to determine.

You will find a formal verdict for you to use regardless of what your verdict may be. The formal verdict reads as follows as to each defendant—first, defendant, Joseph Mary Ebeling, the verdict reads:

> "We, the jury in the above entitled cause in the trial of the indictment herein as to defendant, Joseph Mary Ebeling and Charles Gustave Emerling, find as follows:
>
> "'We find the defendant, Joseph Mary Ebeling', and then a blank for the verdict, 'as charged in Count 1 of the indictment,' and in that you will write guilty or not guilty as you find, and then you will find a like blank as to each of the remaining counts of the indictment of Joseph Mary Ebeling."

Then as to the defendant Charles Gustave Emerling you will have this form:

> "'We, the jury, find defendant, Charles Gustave Emerling,' and then a blank, 'as charged in Count 1 of the indictment', and into that blank you write the

word guilty or not guilty, as you find. You will find a like paragraph and blank for each of the remaining counts of the indictment, and then there is a place for the foreman alone, as such, to sign at the end of the form."

There have been a number of exhibits offered in the case and I say to you again, you will find the bailiff outside your door and if you want any of the exhibits give him a note and they will be furnished to you promptly, and one or more or all of them that you want.

Now, gentlemen, I say this word to you in closing, this is a serious case for the government, and I to you, with equal emphasis, it is a serious case to each of the defendants. If the case and the evidence taken as a whole proves the defendants guilty beyond a reasonable doubt under this charge as to any one or more of the counts of the indictment, that should be your finding as to those counts.

On the other hand, if the government has failed to carry its burden of proof as to any one or all the counts of the indictment, then your verdict as to that count or counts should be a verdict of not guilty.

Approach the case calmly, cooly, and as I said at the outset, as judges, to determine wherein the truth of this controversy lies, and then so determine by your verdict.

(Whereupon, the following proceedings were had out of the hearing of the jury:)

Mr. Bollinger: Defendant Emerling respectfully objects and excepts to the charge of the court wherein the court states that it is not necessary that the invoice itself be exhibited to a department or agency of the government, for the reason the law provides the document itself should be exhibited to said department or agency.

Mr. Duggan: For the defendant Ebeling, I adopt the exception heretofore made by defendant Emerling, and further except to the entire charge as not correctly stating the law, and particularly with respect to the law of conspiracy.

Mr. Bollinger: We adopt that exception.

The Court: Let the record show objections by each defendant adopted by other defendant.

(Whereupon, the following proceedings were had in the hearing of the jury.)

The Court: Members of the jury, you may now retire to consider your verdict.

(Whereupon, the jury retired to their jury room to consider their verdict, and thereafter on the same day, the jury returned to the court room and the following proceedings were had:)

The Court: Have you reached a verdict, gentlemen?

The Foreman: Yes, sir.

The Court: The clerk will read the verdict.

(Thereupon, the clerk read aloud the verdict which was returned by the jury, and which is in words and figures, as follows, to-wit:)

"In the District Court of the United States
Eastern Division, Eastern District
of Missouri.

United States of America, Plaintiff, vs. Joseph Mary Ebeling, and Charles Gustav Emerling, Defendants.	No. 28379(2).

Jury Verdict.

[Filed March 22, 1955.]

"We, the jury in the above entitled cause on the trial of the indictment herein as to defendants, Joseph Mary Ebeling and Charles Gustav Emerling, find as follows:

"We find the defendant, Joseph Mary Ebeling, guilty as charged in Count 1 of the indictment herein.

"We find the defendant, Joseph Mary Ebeling, guilty as charged in Count 2 of the indictment herein.

"We find the defendant, Joseph Mary Ebeling, guilty as charged in Count 3 of the indictment herein.

"We find the defendant, Joseph Mary Ebeling, guilty as charged in Count 4 of the indictment herein.

"We find the defendant, Joseph Mary Ebeling, guilty as charged in Count 5 of the indictment herein.

"We find the defendant, Joseph Mary Ebeling, guilty as charged in Count 6 of the indictment herein.

"We find the defendant, Joseph Mary Ebeling, guilty as charged in Count 7 of the indictment herein.

"We find the defendant, Joseph Mary Ebeling, guilty as charged in Count 8 of the indictment herein.

"We find the defendant, Joseph Mary Ebeling, guilty as charged in Count 9 of the indictment herein.

"And we, the jury, find the defendant Charles Gustav Emerling, guilty as charged in Count 1 of the indictment herein.

"We find the defendant, Charles Gustav Emerling, guilty as charged in Count 2 of the indictment herein.

"We find the defendant, Charles Gustav Emerling, guilty as charged in Count 3 of the indictment herein.

"We find the defendant, Charles Gustav Emerling, guilty as charged in Count 4 of the indictment herein.

"We find the defendant, Charles Gustav Emerling, guilty as charged in Count 5 of the indictment herein.

"We find the defendant, Charles Gustav Emerling, guilty as charged in Count 6 of the indictment herein.

"We find the defendant, Charles Gustav Emerling, guilty as charged in Count 7 of the indictment herein.

"We find the defendant, Charles Gustav Emerling, guilty as charged in Count 8 of the indictment herein.

"We find the defendant, Charles Gustav Emerling, guilty as charged in Count 9 of the indictment herein.

(Signed) "Richard Hahn,
Foreman."

The Clerk: Gentlemen of the jury, is the verdict I read your true verdict in the cause?

The Foreman: It is.

The Clerk: So sayeth the jury.

The Court: Verdict will be filed. Do counsel for the defendants desire any orders before the jury retires?

Mr. Duggan: We would like time to file necessary motions.

The Court: Well, I am going to release the jury.

Members of the jury, I thank you for your services in this case and you will be notified when your services are further required.

You may now pass out. Thank you very much.

Announce a recess.

United States District Court,
Eastern District of Missouri,
Eastern Division.

United States of America,
Plaintiff,
vs.
Joseph Mary Ebeling and
Charles G. Emerling,
Defendants.
} No. 28379 (2)

Motion for New Trial or an Arrest of Judgment or for Judgment of Acquittal.

(Filed April 3, 1956.)

The defendant, Charles G. Emerling, moves the Court to grant him a new trial or in the alternative for arrest of judgment for the following reasons:

1. The Court erred in denying defendant's Motion for Acquittal made at the conclusion of the evidence in the following respects:

A. That there is no evidence that the defendant Emerling made or used in any respect the invoices alleged by the U. S. Government as being false writings within the meaning of the statute.

B. That the defendant Emerling did not authorize or direct anyone in his behalf to make or use any false writing as alleged by the Government.

C. That the evidence failed to show that the defendant Emerling agreed with, combined with or conspired with any other person to defraud the Government nor was there any evidence that he committed any overt act in connection with conspiracy alleged in Count IX of the Indictment.

D. That the Court erred in permitting the witness Wesley C. Thompson to testify as to certain statements allegedly made by the co-defendant Joseph Mary Ebeling for the reason that the Government failed to establish the corpus delicti and that such alleged admissions against the interest of either of these defendants is inadmissible because the corpus delicti has never been proven.

2. That the verdict is contrary to the weight of the evidence for all the reasons heretofore assigned in paragraph No. 1 above.

3. That the verdict is not supported by substantial evidence for all the reasons heretofore assigned in paragraph No. 1 above.

4. That the Court erred in overruling objections to the admission in evidence of Government's Exhibits 6, 7, 8 and 9, for the reason that said exhibits were not true and accurate reproductions of those material objects as they would have appeared at the time alleged in the indictment; that it is apparent on the record that said exhibits would necessarily have been in a different physical shape than those identified, offered and admitted into evidence.

5. The Court erred in admitting testimony of the witness Wesley C. Thompson to which objections were made as

against the defendant Emerling, for the reason that before an admission by a co-conspirator may be received as an admission against interest of the other conspirators the fact of the conspiracy must be established, which was not done in this case.

6. The Court erred in admitting testimony of the witness Bruce Humphreys to which objections were made, for the reason that the testimony of said Bruce Humphreys was not proper rebuttal evidence, and for the further reason that the testimony necessarily was intended to impeach the testimony of Government's witness Harry Sanborn.

7. The Court erred in admitting testimony of the witness James Hemphill to which objections were made in behalf of the defendant Emerling, for the reason that there was no substantial evidence of any conspiracy existing as to the defendant Emerling.

8. The Court erred in admitting testimony of the witness Donald Ray to which objections were made in behalf of the defendant Emerling, for the reason that there was no substantial evidence of any conspiracy existing as to the defendant Emerling.

9. The Court erred in receiving into evidence Government Exhibits 3, 4 and 5 to which objections were made, for the reason that there was no foundation laid showing that the objects were similar to or corresponded with blueprints used by the corporation, Production Engineering & Mfg. Co., in connection with the manufacture of these parts.

10. The Court erred in charging the jury.

11. The defendant was substantially prejudiced and deprived of a fair trial by reason of the following circumstances: the attorney for the Government stated in his argument that, as a result of the investigation made by the Federal Bureau of Investigation, he was aware of facts not offered into evidence that indicated the guilt of these defendants.

12. The Court erred in overruling defendant's Motion to Require the Government to Elect, for the reason that the evidence as offered indicated that there was only one

document used in a matter within the jurisdiction of a department or agency of the Government.

Defendant requests oral argument.

TED A. BOLLINGER, JR.,
Attorney for defendant Charles G. Emerling,
408 Olive Street,
St. Louis, Missouri,
CH 1-0202.

In the District Court of the United States,
Eastern Division, Eastern Judicial
District of Missouri.

United States of America,
Plaintiff,
v.
Joseph Mary Ebeling, and Charles G. Emerling,
Defendants.
No. 28379 (2).

Motion of Defendant, Joseph Mary Ebeling, in Arrest of Judgment, or in the Alternative for Judgment of Acquittal or in the Alternative for a New Trial.

(Filed April 3, 1956.)

Comes now defendant, Joseph Mary Ebeling, and files his motion in arrest of Judgment or in the alternative for judgment of acquittal or in the alternative for a new trial and for his grounds thereof states:

1.) The indictment fails to charge an offense against the United States as to Joseph Mary Ebeling in that it is not charged that Charles G. Emerling and/or the Production Engineering and Manufacturing Company was an agent or instrumentality of the United States to whom this defendant allegedly furnished the claimed false writings.

2.) The indictment fails to charge an offense against the United States under the statute as to defendant Joseph

Mary Ebeling in that the indictment fails to allege that the claimed false statements or writings were material.

3.) The verdict is contrary to the weight of the evidence.

4.) The Court erred in admitting into evidence over objection of this defendant, plaintiff's exhibit #1, being a certain contract between the United States Army Ordnance Department and Production Engineering and Manufacturing Company, a corporation, for the reason it is not alleged nor shown that this defendant or the Manchester Machine Company is a party to such contract, nor subject to the Renegotiation Act of 1951, which is contained in said contract and exhibit.

5.) The Court erred in admitting into evidence as against this defendant and over his objection plaintiff's exhibit #2, being a cost statement presented by the Production Engineering and Manufacturing Company to the Department of the Army, for the reason that there is no evidence that this defendant had any connection whatever with such statement whether in its preparation or its presentation to the Department of the Army.

6.) The Court erred in admitting into evidence as against this defendant and over his objection, plaintiff's exhibits #3, #4 and #5, being three blueprints of original tracings of the housing unit, adapter and striker for the reason that there is no evidence that these blueprints were ever exhibited to this defendant.

7.) The Court erred in admitting into evidence as against this defendant and over his objection, plaintiff's exhibits #6, #7, #8 and #9 being the finished products of the adapter, housing, striker units, as contained in the mortar kit assembly for the reason that the work to be performed by the Manchester Machine Company was in accordance with specific route sheets which covered only a few phases of the operation of the specific unit itself from its raw state and did not include machine shop work on these items in a finished and completed state.

8.) The Court erred in overruling defendant's motion for judgment of acquittal at the close of plaintiff's case.

9.) The Court erred in overruling defendant's motion for judgment of acquittal at the close of all of the evidence.

10.) The Court erred in overruling defendant's motion for a continuance of such trial, said order prevented this defendant from adequately preparing his defense to the indictment.

11.) The Court erred in overruling defendant's motions to dismiss the indictment.

12.) The Court erred in failing to sustain the objections of defendant to strike the testimony of Vernon Carreras on rebuttal relative to statements made to him by Carl Emerling.

13.) The Court erred in refusing to strike the testimony of Wesley C. Thompson concerning his answer as to why he refused to prepare two invoices as requested by defendant Ebeling. Thompson stated he knew the invoices were false because the work had not been done. Thompson subsequently admitted he had no knowledge that the work had not been done, but that it was his belief; such testimony admitted into the record was highly prejudicial to this defendant.

14.) The Court erred in giving the charge to the jury that the Court did give, and to which charge, at the time of its giving by the Court, the defendants objected.

15.) The Court erred in charging the jury that if they found that the invoices were included in the ultimate costs statement submitted to the Government, (plaintiff's exhibit #2) then such false writings were a matter within the jurisdiction of a Department and Agency of the United States.

16.) The verdict is not supported by substantial evidence in that plaintiff's witness, William Birchler, the accountant who prepared the cost statement, on behalf of Production Engineering and Manufacturing Company, (plaintiff's exhibit #2), admitted that it was possible that some of the claimed false invoices were not included in the ultimate cost statement and hence a doubt exists as to the accuracy of said cost statement.

17.) The evidence wholly failed to show that defendant Joseph Mary Ebeling conspired, agreed or combined with any other person or persons to defraud the Government of the United States.

Defendant requests oral argument.

JEROME F. DUGGAN,
DUBINSKY & DUGGAN,
Attorneys for Defendant
Joseph Mary Ebeling,
705 Chestnut Street,
St. Louis 1, Missouri,
Main 1-4940.

Copy of the foregoing motion served upon plaintiff and co-defendant this 3rd day of April, 1956.

S. HORWITZ.

United States District Court,
Eastern District of Missouri,
Eastern Division.

United States of America,
Plaintiff,
vs.
Joseph Mary Ebeling and Charles G. Emerling,
Defendants.
No. 28379(2).

Hulen, Judge.

Memorandum.

(Filed April 17, 1956.)

Defendants' use of such cases as *Lowe v. United States*, 141 F. 2d 1005 (5th Cir., 1944), to support their motions is based on an erroneous assumption of the charge in this case.

We do not have a case of padding an expense account or if making excess charges for services rendered or supplies furnished in a matter within the jurisdiction of a Government agency, such aas existed in the *Lowe* case and other cases relied on by the defendants.

In this case the two defendants, Ebeling and Emerling, are charged with making and using a false writing, knowing it to have been false, in a matter within the jurisdiction of an agency of the United States.

It is true that defendant Ebeling, who operated a manufacturing business under a trade name, had no Government contract, but this fact is collateral because the record sustains a jury finding, in accordance with the theory of the Government, that no supplies, work or services were ever furnished by Ebeling and that both defendants knew this. Defendant Ebeling used his business invoice form to make the false writing. The fact that he was in a business that could have supplied the products or done the work which was billed to Emerling simply gave a semblance of good faith to the representations set out in the invoices used.

Defendant Ebeling originally ordered one of his employees to fill out the invoices but the employee had refused because, as the employee testified, he knew he was being requested to make out false invoices. The invoices which the employee refused to make were nevertheless filled out and became a part of the records of Emerling, who had a Government contract and used the false invoices in price renegotiation with a Government agency.

The requisitions of Emerling's company were a part of the paper transactions and formed the basis for the use of the false invoices. They were the purchase orders which Ebeling presented to his employee from which to have the false invoices made. On them was printed information which told Ebeling that payment on the Government contract, of which the invoices became a part, was subject to Government price renegotiation. The purchase orders came from the company owned by defendant Emerling. There was circumstantial evidence that the requisitions were issued at the direction of Emerling. This defendant signed the checks in payment of the invoices. The two defendants were close personal friends.

Because of these facts we do not think that the *Lowe* case and like rulings are authority for defendants' posi-

tion that a prima facie case was not made by the Government.

The record in this case of defendant Ebeling's efforts to get his bookkeeper to make the false invoices, together with the absence of any explanation of the conversation with the bookkeeper by defendant Ebeling, makes the Government's case clear and convincing as to Ebeling.

The evidence against defendant Emerling is circumstantial. Considering his friendship and close personal relations with Ebeling, the record of the issuance of the requisitions to support the false invoices and Emerling's signature to the checks in payment of the false invoices, the jury was justified in finding that Emerling knew the false nature of the transaction and knew why he was signing checks payable to his personal friend. Emerling made no effort to explain the transaction. He only asserted his ignorance of the bookkeeping system of his company. Under these facts we think the ruling in *United States v. Leviton*, 193 F. 2d 848 (2d Cir., 1951), as to the inferences which might be drawn from the evidence against a defendant in that case, is pertinent:

> "But his signatures on these declarations and upon four Brazilian declarations utilized in the companion schemes were unchallenged. Moreover, it appeared highly improbable, in view of the large number of declarations approved each day by the visa clerks in the Customs House, that Markowitz received these fourteen declarations in the normal course of his duties. This, in the light of the formal irregularities varying in degree but nevertheless apparent on the face of these declarations and a series of observed meetings and conversations with Leviton, was strong circumstantial proof of his guilty knowledge. In the absence of any innocent explanation of these circumstances the jury could properly draw the inference that when Markowitz approved the ten declarations successfully used in the fraudulent scheme he knew their dishonest character" (l. c. 852).

The statute, 18 U. S. C., § 1001 (formerly 18 U. S. C., § 80), upon which the first eight counts of the indictment

are based encompasses renegotiation of prices with the Government agency (notice of which appeared on the requisition or purchase order shown to have been issued by Emerling's company and to have been in defendant Ebeling's possession) as well as filing the claim or invoice itself to support a payment of Government funds. See *Spivey v. United States*, 109 F. 2d 181, 185 (5th Cir., 1940).

Complaint is made as to the admission of Government's Exhibits 6, 7, 8 and 9, which are land mine assembly parts similar to those referred to in the false invoices as well as in the purchase orders. Defendants argue that the physical objects exhibited were not in the same condition as the parts were when the crime was committed. The weakness of this claim is that it is the Government's position that no work was done on the parts, contrary to the representations in the false invoices. These exhibits served only to show that they were the kind of parts referred to in the false invoices, thus forming a base for testimony by workmen at the Ebeling plant in St. James, that no work had been done on parts of the description shown by the exhibits, while they were in any stage of completion. This evidence tends to establish the falsity of the transaction recited in the invoices. Since no work was done, it would have been physically impossible to show the exhibits in the state of completion which existed at the time of the commission of the crime.

Order.

Motion of defendant Charles G. Emerling for a new trial or an arrest of judgment, or for judgment of acquittal, is Overruled.

Motion of defendant Joseph Mary Ebeling in arrest of judgment, or in the alternative for judgment of acquittal, or in the alternative for a new trial, is Overruled.

(s) .....

Judge.

Judgment and Sentence of Charles G. Emerling.

(Filed May 4, 1956.)

Judgment and Commitment.

United States District Court
for the
Eastern Division, Eastern District of Missouri.

United States of America
v.
Charles G. Emerling
} No. 28379(2)

On this 4th day of May, 1956, came the attorney for the government and the defendant appeared in person and with Ted Bollinger, his attorney.

It Is Adjudged that the defendant has been convicted upon his plea of not guilty and verdict of guilty by the jury, of the offense of feloniously and unlawfully making false, fictitious and fraudulent statements and entries, in writing, in a matter within the jurisdiction of the Department of the Army, Ordnance, a Department and Agency of the United States, etc., as charged in Counts 1, 2, 3, 4, 5, 6, 7, 8 and 9, of indictment herein, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Twelve Months (12) as to and under the charge as contained in each of Counts 1, 2, 3, 4, 5, 6, 7, 8 and 9 of the indictment herein, such terms of imprisonment to run concurrently; and punishment of said defendant under Count 9 of indictment herein, further fixed at a fine of Two Thousand, Five Hundred ($2,500.00) Dollars, and that said defend-

ant be imprisoned until payment of said fine, or until said defendant is otherwise discharged as provided by law.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

Signed this 22nd day of October, 1956, pursuant to authority of Rule 25 F. R. Cr. P., because of intervening death of Hon. Rubey M. Hulen, U. S. District Judge of this Court, before whom deft. was tried, a verdict of guilty returned, above sentence imposed and deft. admitted to bail pending determination of his appeal therefrom, which death occurred before the signing by decedent of within Judgment and Commitment.

(Signed) GEO. H. MOORE,
United States District Judge.

JAMES J. O'CONNOR,
Clerk.

A True Copy. Certified this 22nd day of October, 1956.

(Signed) JAMES J. O'CONNOR,
Clerk.

(By) JOHN J. JARVIS,
Deputy Clerk.

(Seal)

Judgment and Sentence of Joseph Mary Ebeling.

(Filed May 4, 1956.)

United States District Court for the
Eastern Division, Eastern District
of Missouri.

United States of America
v.
Joseph M. Ebeling.
No. 28379(2).

On this 4th day of May, 1956, came the attorney for the government and the defendant appeared in person and

with Jerome F. Duggan; S. W. Horwitz and Michael J. Ebeling, his attorneys.

It Is Adjudged that the defendant has been convicted upon his plea of not guilty and verdict of guilty by the jury of the offense of feloniously and unlawfully making false, fictitious and fraudulent statements and entries, in writing, in a matter within the jurisdiction of the Department of the Army, Ordnance, a Department and Agency of the United States, etc., of indictment herein, as charged in counts 1, 2, 3, 4, 5, 6, 7, 8, & 9, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Twelve Months (12) as to and under the charge as contained in each of counts 1, 2, 3, 4, 5, 6, 7, 8 & 9 of the indictment herein, such terms of imprisonment to run concurrently; and punishment of said defendant under count 9 of indictment herein, further fixed at a fine of Two Thousand Five Hundred ($2,500.00) Dollars, and that said defendant be imprisoned until payment of said fine, or until said defendant is otherwise discharged as provided by law.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

Signed this 22nd day of October, 1956, pursuant to authority of Rule 25, F. R. Cr. P., because of intervening death of Hon. Rubey M. Hulen, U. S. District Judge of this Court, before whom deft. was tried, a verdict of guilty returned, above sentence imposed and deft. admitted to bail pending determination of his appeal therefrom, which

death occurred before the signing by decedent of within Judgment & Commitment.

GEO. H. MOORE,
United States District Judge.

JAMES J. O'CONNOR,
Clerk.

A True Copy. Certified this 22nd day of October, 1956.

(Signed) JAMES J. O'CONNOR,
Clerk.

(By) JOHN J. JARVIS,
(Seal) Deputy Clerk.

United States District Court
Eastern District of Missouri
Eastern Division

United States of America,
Plaintiff,

vs.

Joseph Mary Ebeling and Charles G. Emerling,
Defendants.

No. 28379 (2).

Notice of Appeal.

(Filed April 27, 1956.)

(1) Name and address of appellants:

Joseph Mary Ebeling
7730 Mohawk Dr., St. Louis, Missouri

Charles G. Emerling
#34 Sunset Court, Normandy, Missouri

(2) Names and addresses of appellants' attorneys:

Michael J. Ebeling, Attorney for appellant
Joseph Mary Ebeling
422 S. Hanley, St. Louis, Missouri

Ted A. Bollinger, Jr., Attorney for appellant
Charles G. Emerling
408 Olive St., St. Louis 2, Missouri

(3) Offense: Violation of Section 1001, Title 18, United States Code—Making and Using False and Fictitious Writings; and Section 371, Title 18, United States Code—Conspiracy to Defraud the United States.

(4) Judgment and sentence:

On March 22, 1956, a jury found the defendants guilty on all nine (9) counts of the indictment.

The Court overruled defendants' Motions for a New Trial, in Arrest of Judgment, or Judgment of Acquittal on April 17, 1956.

(5) The defendants are not now confined in that sentencing by the Court has been deferred until May 4, 1956.

We, the above named appellants, hereby appeal to the United States Court of Appeals for the Eighth Circuit from the above-stated judgment.

JOSEPH MARY EBELING,
Appellant.
CHARLES G. EMERLING,
Appellant.

Dated this 27th day of April, 1956.

United States District Court
Eastern District of Missouri
Eastern Division

United States of America,
Plaintiff,
vs.
Joseph Mary Ebeling and Charles G. Emerling,
Defendants.
No. 28379 (2).

Notice of Appeal.

(Filed May 9, 1956.)

(1) Names and addresses of appellants:

Joseph Mary Ebeling
3920 Lindell Blvd., St. Louis, Missouri

Charles G. Emerling
#34 Sunset Court, Normandy, Missouri

(2) Names and addresses of appellants' attorneys:

Michael J. Ebeling, attorney for appellant
Joseph Mary Ebeling
422 S. Hanley, St. Louis, Missouri

Ted A. Bollinger, Jr., attorney for appellant
Charles G. Emerling
408 Olive St., St. Louis 2, Missouri

(3) Offense: Violation of Section 1001, Title 18, United States Code—Making and Using False and Fictitious Writings; and Section 371, Title 18, United States Code—Conspiracy to Defraud the United States.

(4) Judgment and sentence:

On March 22, 1956, a jury found the defendants guilty on all nine (9) counts of the indictment.

The Court overruled defendants' Motions for a New Trial, in Arrest of Judgment, or Judgment of Acquittal on April 17, 1956.

The sentence and judgment of the Court entered May 4, 1956, was that the defendants were sentenced to be confined in an institution designated by the Attorney General for a period of twelve (12) months and a fine of $2500.00 on Count Nine of the indictment, and further sentenced to a term of twelve (12) months on each of the first eight counts of the indictment, said sentence to run concurrently with sentence on Count Nine.

(5) The defendants are not now confined in that bond for appeal has been granted, bond filed.

We, the above named appellants, hereby appeal to the United States Court of Appeals for the Eighth Circuit from the above-stated judgment.

JOSEPH MARY EBELING,
Appellant.
CHARLES G. EMERLING,
Appellant.

Dated this 8 day of May, 1956.

Clerk's Docket Entries.

1955

October 12—Indictment filed.

October 12—On oral motion of U. S. Atty., order filed fixing separate appearance bonds of defts. J. M. Ebeling and Charles G. Emerling in the penal sum of $1,000.00 to be taken before a U. S. Commissioner, etc. On separate praecipes filed by U. S. Atty., writs of capias issued for aforesaid defts. returnable forthwith.

October 13—Separate appearance bond of deft. Charles G. Emerling as given before and approved by U. S. Commissioner, and made returnable in Court 2 on October 17, 1955, filed.

October 14—Appearance bond of deft. Jos. M. Ebeling in sum of $1,000.00 as given before and approved by U. S. Commissioner and made returnable in Court No. 2 on October 17, 1955, filed. Deft. Jos. M. Ebeling deposits in Court in lieu of surety, the sum of $1,000.00 as security on aforesaid appearance bond, in the form of a Cashier's check payable to the order of the Clerk of this Court, which sum is deposited by the Clerk in the Registry.

October 17—Entry of appearance of Michael J. Ebeling as atty. for deft. Joseph M. Ebeling and entry of appearance of Ted A. Bollinger, Jr., as atty. for deft. Charles G. Emerling, filed. Deft. Jos. M. Ebeling appears with Michael J. Ebeling, his atty. and on oral application defts. granted on or before November 25, 1955 to file any contemplated motions and such motions so filed set for hearing on said date. Cause passed for arraignment to November 25, 1955.

October 20—Joint motion of defts. for restoration of seized property of defts., together with notice directing said motion for hearing in Court Two on October 27, 1955, filed.

October 27—Joint motion of defts. for restoration of seized property of defts. argued and submitted.

November 1—Order filed overruling motion of defts. to return books, records and papers.

November 22—Joint motion of defendants to dismiss indictment, for bill of particulars, to stay proceedings, for discovery and inspection, etc., with endorsed request for oral argument thereon, filed.

November 25—Separate joint motions of defendants (1) for bill of particulars; (2) for discovery and inspection and (3) to stay proceedings argued, submitted and each overruled without prejudice. Separate joint motion of defendants to dismiss argued, submitted and overruled. Arraignment of defendants deferred to December 9, 1955.

November 30—Plaintiff's bill of particulars filed.

December 9—Defendants Joseph M. Ebeling and Charles G. Emerling appear with Michael J. Ebeling and Ted A. Bollinger, their attorneys and upon arraignment each of aforesaid defendants enters plea of not guilty to each of counts 1, 2, 3, 4, 5, 6, 7, 8 and 9 of indictment herein. Cause thereupon set for trial at the head of the Court's calendar docket on March 19, 1956.

1956

February 15—By leave, Michael J. Ebeling withdraws as atty. for deft. Ebeling and Messrs. Jerome F. Duggan, Sidney W. Horwitz and Dubinsky & Duggan, enter their appearance as atty. for said deft.

March 9—Joint motion of defts. to dismiss ind. filed by leave and docketed for hearing on March 15, 1956. On oral application, deft. Ebeling granted leave to file motion with supporting affidavits, for continuance of cause and said motion when filed to be docketed for March 15, 1956.

March 15—Deft. Ebeling appears with Jerome F. Duggan, his atty., and deft. Emerling appears with Ted A. Bollinger, his atty. Motion of deft. Ebeling with supporting affidavits for continuance of cause, filed, argued and submitted and same passed to March 16, 1956. Joint motion of defts. to dismiss, heard, argued, submitted and overruled. Motion of deft. Emerling to quash subpoena duces tecum to produce documents, filed, argued, submitted and overruled.

March 16—Affidavit of Ernest M. Flinn in opposition to motion of deft. Ebeling for a continuance filed. Motion of deft. Ebeling for continuance argued, submitted and denied.

March 19—Deft. Joseph M. Ebeling appears with Jerome F. Duggan, his atty., and deft. Charles G. Emerling appears with Ted A. Bollinger, his atty. and defts. having heretofore entered separate plea of not guilty to each of counts 1 to 9, both inclusive of ind. and cause having been set for trial this day, parties announce ready; jury empaneled and sworn and introduction of evidence on behalf of pltff. on said trial commenced but not concluded and further proceedings on such trial postponed until tomorrow at ten a. m.

March 20—Again come the parties and jury; whereupon the introduction of evidence in chief on behalf of pltff. is resumed, but not concluded, and further proceedings thereon postponed until tomorrow at ten a. m.

March 21—Again come the parties and jury; whereupon the introduction of evidence on behalf of pltff. is resumed and concluded. Joint oral motion of defts. for judgment of acquittal at close of pltff's case in chief made, submitted and overruled. Thereupon the introduction of evidence on behalf of defts. is commenced and concluded. The introduction of evidence in rebuttal on behalf of pltff. is commenced and concluded. Joint oral motion of defts. for judgment of acquittal at close of the entire case made, submitted and overruled. Joint oral motion of defts. to require pltff. to elect on which one of the counts one to eight of the indictment it will proceed made, submitted and overruled. Whereupon further proceedings on trial of defts. postponed until tomorrow at 10:00 a. m.

March 22—Again come the parties and jury; whereupon trial of defts. is resumed and the jury, after hearing arguments of counsel and being charged by the Court, retires to consider its verdict, which verdict it returns into Court finding deft. Joseph M. Ebeling guilty as charged in each of counts 1, 2, 3, 4, 5, 6, 7, 8 and 9 of

the indictment herein; and finding deft. Charles G. Emerling guilty as charged in each of counts 1, 2, 3, 4, 5, 6, 7, 8 and 9 of the indictment herein. Verdict filed. Imposition of sentence upon each of said defendants thereunder deferred to April 6, 1956; and defendants each released on their existing appearance bonds until that date. Oral motion each of said defts. granted to April 3, 1956 to file any contemplated motions, such motions, if any, to be heard on April 6, 1956.

April 3—Motion of deft. Joseph M. Ebeling, in arrest of judgment, or in the alternative for judgment of acquittal or in the alternative for a new trial, with request for oral argument endorsed thereon, filed. Motion of deft. Charles G. Emerling for new trial or in arrest of judgment with request for oral argument endorsed thereon, together with said deft's memo in support of such motion, filed.

April 6—Deft. Ebeling appears with Jerome Duggan and S. W. Horwitz, his attys., and deft. Emerling appears with Ted Bollinger, his atty. Separate motion of deft. Ebeling in arrest of judgment, or in the alternative, for a judgment of acquittal, or in the alternative for a new trial, argued and submitted. Separate motion of deft. Emerling for new trial, or for arrest of judgment, or for judgment of acquittal, submitted without oral argument. Imposition of sentence upon defts. under verdict returned by jury on trial of cause finding each of said defts. guilty as charged in each of counts 1 to 9 incl. of ind., herein, further deferred to May 4, 1956.

April 17—Memo opinion of the Court and appended order in accordance therewith filed overruling motion of deft. Chas. G. Emerling for a new trial or an arrest of judgment, or for judgment of acquittal, and overruling motion of deft. Jos. M. Ebeling in arrest of judgment, or in alternative, for judgment of acquittal, or in alternative for a new trial.

April 27—Joint notice of appeal of defts. Jos. M. Ebeling and Charles G. Emerling, to U. S. Court of Appeals, 8th Circuit, from judgment and order entered April 17, 1956

overruling defts' motions for a new trial, and in arrest of judgment, or judgment of acquittal, prior to, imposition of sentence and 1 copy of such notice of appeal, together with certificate of docket entries in cause, transmitted by Clerk of this Court to Clerk of aforesaid appellate court.

May 4—By leave, Michael J. Ebeling re-enters his appearance as counsel for deft. Jos. M. Ebeling. Deft. Jos. M. Ebeling appears with Jerome Duggan, S. W. Horwitz, and Michael J. Ebeling, his attys. and deft. Chas. G. Emerling appears with Ted Bollinger, his atty., for imposition of sentence under verdict returned by jury on trial of cause finding each of aforesaid defts. guilty as charged in each of cts. 1, 2, 3, 4, 5, 6, 7, 8 and 9 of ind. herein. Each of said defendants Ebeling and Emerling under ct. 9 of ind. committed to the custody of the Atty. Genl. for imprisonment for a term of 12 months; and punishment of each of aforesaid defts. under said count 9 further fixed at a fine of $2500.00 to stand committed, etc. and each of aforesaid defts. Ebeling and Emerling under each of cts. 1, 2, 3, 4, 5, 6, 7 and 9 of within ind. committed to the custody of the Atty. Genl. for imprisonment for a term of 12 months, such terms of imprisonment to run concurrently with each other as well as concurrently with the term of imprisonment of 12 months imposed upon said defts. under said count 9 of said ind. Each of said defts. remanded to the custody of the U. S. Marshal. Oral application of each of aforesaid defts. for admission to bail pending judgments and sentences herein made, submitted and granted and bail bond of each of aforesaid defts. pending determination of proposed appeals fixed in the penal sum of $5,000.00, such bonds to be taken before and approved by U. S. Commissioner. Separate bail bonds on appeal of defts. Ebeling and Emerling, each in the penal sum of $5,000.00 as given before and approved by U. S. Commissioner, filed.

May 9—Joint notice of appeal of defts. Jos. M. Ebeling and Chas. G. Emerling to the U. S. Court of Appeals, 8th Circuit, from the judgment and sentence entered herein against said defts. May 4, 1956 filed in duplicate and one

copy of such notice of appeal, together with certificate of docket entries in cause forthwith transmitted by Clerk of this Court to Clerk of aforesaid appellate court.

Certified this 11th day of May, 1956.

JAMES J. O'CONNOR,
Clerk,

(Seal)

By JOHN J. JARVIS,
Deputy Clerk.

In the

Supreme Court of the United States

OCTOBER SESSION, 1957

No. 596

CHARLES G. EMERLING,
PETITIONER,

vs.

UNITED STATES OF AMERICA,
RESPONDENT.

Petition for Writ of Certiorari

TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT.

MICHAEL J. EBELING,
422 S. Hanley Road, St. Louis 5, Missouri,
TED A. BOLLINGER, JR. (*of Counsel*),
408 Olive Street, St. Louis 2, Missouri,
Attorneys for Petitioner.

BISSON PRESS, 216 South Seventh Street, St. Louis 2, Mo.—CHestnut 1-8058

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Petition for Writ of Certiorari

TO THE UNITED STATES COURT OF APPEALS
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Petitioner prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above entitled cause on August 28, 1957.

OPINION BELOW

The opinion of the Court of Appeals has not yet been reported and is printed in the Appendix, infra, p. 13.

JURISDICTION

The judgment of the Court of Appeals was entered on August 28, 1957 (Appendix, infra, p. 30). A timely petition for rehearing was filed by petitioner, and this petition was denied on October 3, 1957. The jurisdiction of this Court is invoked under 28 U.S.C.A. § 1254(1).

QUESTIONS PRESENTED

(1) Whether the passing of alleged false writings from one individual defendant to another individual defendant and later used by parties not named in the indictment some eight months later constitutes an offense under Section 1001, Title 18, United States Code.

(2) Whether in a prosecution under a felony indictment for making and using false statements in a matter within the jurisdiction of a department or agency of the United States under Section 1001, Title 18, United States Code, the trial Court is permitted by Rule 31(b) of the Federal Rules of Criminal Procedure to give an instruction which required the jury to return a joint verdict only of guilt or innocence and thus depriving the defendants of the benefits of said Rule 31(b).

(3) Whether the opinion of the Court below is in conflict with the opinion of the Circuit Court of Appeals for the Fifth Circuit in *Lowe v. United States*, 141 F. (2d) 1005.

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STATUTES AND RULES INVOLVED

Rule 31(b), Federal Rules of Criminal Procedure, provides:

> "Several Defendants. If there are two or more defendants, the jury at any time during its deliberations may return a verdict or verdicts with respect to a defendant or defendants as to whom it has agreed; if the jury cannot agree with respect to all, the defendant or defendants as to whom it does not agree may be tried again."

18 U.S.C. § 1001, provides:

> "Statements or entries generally. Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000.00 or imprisoned not more than five years, or both."

STATEMENT

Petitioner, together with one Joseph Mary Ebeling, was convicted by a jury on eight counts of violations of Section 1001, supra, and of one count of conspiracy under Section 371, Title 18, United States Code, under a nine-count indictment, and was sentenced to imprisonment for a period of 12 months on each count of the indictment to run concurrently with each other and in addition, a fine of $2500.00 was imposed on the ninth count of the indictment, the conspiracy count. The indictment in the first eight counts (R. 1-8) accused petitioner, together with the said Joseph Mary Ebeling, with making and using false

writings containing false statements and entries in a matter within the jurisdiction of a department or agency of the United States, the Department of the Army, Ordnance. The only items of difference in each of the first eight counts were dates, amounts of money and number and kind of parts contained in certain invoices; each count represented a separate invoice issued by a company operated by Joseph Mary Ebeling to a corporation of which petitioner was president. The ninth count (R. 8-12) accused the petitioner of conspiring with the said Joseph Mary Ebeling and other individuals and a corporation which were not indicted, to commit the offenses set out in the other counts of the indictment.

The petitioner was president of Production Engineering & Manufacturing Co., a manufacturing corporation, and Joseph Mary Ebeling was manager of a business operated under the trade name of Manchester Machine Co. (R. 1).

Production Engineering & Manufacturing Co., the corporation, obtained a contract from the Department of the Army, Ordnance, in May, 1951, to produce mortar conversion kits for said department. The contract contained a price redetermination clause, which required the filing of a statement of its costs to produce the said kits, which was submitted by the corporation in January, 1953 (R. 21).

In March, April and May, 1952, while the contract was in force, Production Engineering subcontracted to Manchester Machine Co. to perform certain machine work on three of the component parts going into the mortar conversion kit assemblies. Production Engineering executed three purchase orders to Manchester Machine, requesting performance by the latter of certain machine shop operations on 1,200 adapters at a total price of $7,776.00, on 1,200 housings at a total price of $9,888.00, and on 2,500 strikers at a total price of $8,050.00, respectively (R. 29-30).

The government prosecuted its case on the theory that the machine work ordered by Production Engineering Co. to be performed by Manchester Machine Co. was never actually performed by the latter; that Joseph Mary Ebeling, individually, prepared certain invoices indicating the work had been done and presented the same to the corporation, Production Engineering, and that Manchester Machine Co. received payment therefor, in the total amount of $20,298.24 (R. 19); that the invoices of Manchester Machine so paid for by Production Engineering were, some eight months later, incorporated in a statement of costs of production of said mortar conversion kits, prepared by certified public accountants of Production Engineering, which statement was signed by the executive vice-president of the corporation, not a party to the indictment, and presented to the St. Louis Ordnance District, Department of the Army, Ordnance, St. Louis, Missouri (R. 58-60).

The evidence on behalf of the government tended to establish that the only connection petitioner had to the invoices in issue was that he was a president of the corporation at the time in question; that, as president, he signed the checks issued in payment for the invoices of Manchester Machine Co. (R. 31-32); and that he and the manager of Manchester Machine Co., Joseph Mary Ebeling, were friendly (R. 54).

The indictment alleged, and the government's theory of the case was, that the designated invoices were furnished by the individual Joseph Mary Ebeling to the individual, petitioner, Charles G. Emerling, and became a part of a statement of costs of a corporation, Production Engineering & Manufacturing Co., which was submitted by the corporation to a department or agency of the United States (R. 1-8).

The evidence was undisputed that petitioner had no physical, actual or constructive participation in or to the

making of the questioned invoices (R. 62) or making of the statement ultimately filed with the Department of the Army, Ordnance, or the signing and presenting of the same to the pertinent agency (R. 59).

The Court below held, in effect, that notwithstanding the evidence of a document passing from an individual to a private corporation, which document was never presented to a department or agency of the United States, was within the jurisdictional requirements of Section 1001, supra. The Court below, in affirming the conviction, further held that tangible acts of participation by petitioner in the crime can be drawn from the fact that he signed the checks in payment, was friendly with the co-defendant, Joseph Ebeling, that it could have been petitioner who authorized issuance of purchase orders and that the co-defendant, Joseph Mary Ebeling, when visiting the Production Engineering factory would call either upon the son, Carl Emerling, named as a co-conspirator not indicated, or his father, the petitioner herein.

The trial Court instructed the jury on the ground that the substantive counts had charged that petitioner and Joseph Mary Ebeling jointly had done the acts involved and in its charge, the trial Court stated that it was not sufficient as a basis for a conviction against them that one of them may have known that the invoice involved was a false writing, but that the jury had to find, before it could convict, that "the knowledge of falsity and intent as to use in a matter within the jurisdiction of the Department of the Army, Ordnance, be known and intended by both defendants" (R. 97).

The Court below held that Rule 31(b) in this instance did not apply and that any error committed in so instructing was beneficial and not harmful.

REASONS FOR GRANTING THE WRIT

1. This case raises important questions concerning the application of the jurisdictional requirement contained in Section 1001, Title 18, supra, as applied by the Circuit Court of Appeals for the Fifth Circuit in *Lowe v. United States*, 141 F. (2d) 1005, and as applied by the Court of Appeals below in the instant case.

The Court below held that the false document need not itself be presented to the pertinent department or agency of the United States, but that the statute "contemplates as well any knowing, making or using of such a document *in intended relationship to a matter* that is within the jurisdiction of said department or agency." (Emphasis supplied.)

The Court below distinguished the Lowe case, supra, from the instant case, on the ground that the "mere circumstance that the employer was entitled to reimbursement from the United States as not of itself being sufficient to require that the employee's receipt of his wages and his statements in relation thereto be regarded as a matter that was within the jurisdiction of a department or agency of the United States." The Court below further stated, at page 10 of its opinion, as follows:

> "We read the opinion as implying that there was in that case no charge, or anything to show, that the employee knew that the work which he was doing, and the wages which he claimed, had been made the subject of an express contract provision between his employer and the government, constituting them a matter of direct charge and reimbursing obligation on the part of the United States; that the working time which he turned in thus necessarily would be a matter which was to be used against the government and as to which it accordingly had a right of audit and adjustment; and that in making the false statement with which he

was charged, he had turned it in on this basis and with the intent that it was to be accepted and used in that relationship."

It is respectfully submitted that there is no factual difference between the ruling of the Circuit Court of Appeals for the Fifth Circuit and the facts as pertaining to petitioner in the instant case and that there is a conflict of opinion between C.C.A. 5 and C.C.A. 8.

2. Rule 31(b) provides for separate verdicts in the case of each defendant when a trial is had on an indictment charging two or more defendants with the same crime.

The trial Court, by its charge, in effect, required the jury to find the defendants both guilty or both innocent which charge would open the door for a jury to find the guilt of one defendant based upon evidence adduced solely against the other. The countervailing policy is the right of every defendant to stand or fall with the proof of the charge made against him, not against someone else. *United States v. Toner*, 3rd Cir., 173 F. (2d) 140, 142.

The Court below held that the charge as given, " * * * in its effect, required the jury to find that each one of them individually was guilty of all elements of the crime before there was a right to convict, but on the basis of the other instruction, prohibited the returning of any verdict whatever of conviction even though one of them might have been proven guilty unless the jury found that the other also had been proved to be so guilty." The Court further concluded that the charge as given was according an improper benefit and neither defendant could claim that any error committed was prejudicial.

The opposite conclusion can be reached that such an instruction can be highly prejudicial to an innocent defendant who would be found guilty after the guilt of his

co-defendant has been established to the satisfaction of a jury. It is therefore the position of the petitioner that the trial Court improperly charged the jury by requiring a finding of joint innocence or guilt by failing to observe the requirements of Rule 31(b), supra.

3. The jurisdiction as set out in the statute, Section 1001, Title 18, supra, requires the use of a false writing to be in a matter within the jurisdiction of any department or agency of the United States. The indictment in counts one through eight charges in part:

> "3. Said false writing was an invoice * * * issued by Manchester for purported charges * * * for machine shop operations on * * * said mortar conversion kits pursuant to a purchase order issued by PEMCO to Manchester. * * * In truth and in fact the work described in said purchase order and said invoice was not performed either in whole or in part, and each and every statement and entry in said invoice was false, fictitious and fraudulent. Said invoice was furnished by defendant Ebeling to defendant Emerling and became the basis of a portion of costs contained in a statement presented by PEMCO to the Department of the Army, Ordnance, on or about January 6, 1953, for the purpose of repricing."

It will be seen that the actual passage of the questioned document was from the individual Joseph Mary Ebeling and the individual Charles G. Emerling as charged by the indictment (R. 1-8).

The Circuit Court of Appeals for the Eighth Circuit in *Terry v. United States*, 131 F. (2d) 40, which followed *United States v. Dietrich*, 126 F. 676, stated as follows:

> "This is a prosecution for a criminal offense. To be punishable, the act charged must have possessed at the time when its commission was complete, every

> element necessary to its criminality under the statute. A completed act which is not an offense at the time of its commission cannot become such by any subsequent act of the party charged, or of another, with which it has no connection; and this is true whether the first act was done for a good or bad purpose * * *."

The indictment on its face, therefore, reveals that a third party intervened in the actual presentment of a document, not the alleged spurious documents, but a separate and distinct instrument—the statement of a corporation's costs of production, which was prepared by persons other than the petitioner. The document ultimately arriving at the offices of the Ordnance District was the work product of persons independent of the petitioner who had nothing to do with its preparation (R. 97).

The record reveals that the statement of costs was prepared by auditors, acting in a capacity of independent contractors, and signed and presented by a person other than petitioner (R. 97). The undisputed testimony offered by the government requires a finding that to come within the jurisdictional requirement of the statute, a crime is completed when one person hands another a document which by mistake, inadvertance or other unintentional circumstances becomes incorporated on a document later presented or delivered to a governmental agency. The Court below apparently so found that mere deposit with a private corporation of a document later questioned by indictment meets the requirement of jurisdiction as required by statute and disregarded any possibility of intervention by third persons under any combination of circumstances.

The petitioner respectfully urges that the crime of making and using a false writing containing false statements and entries in a matter within the jurisdiction of a department or agency of the United States has not been met.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

MICHAEL J. EBELING,
422 S. Hanley Road, St. Louis 5, Missouri,
TED A. BOLLINGER, JR. (*of Counsel*),
408 Olive Street, St. Louis 2, Missouri,
Attorneys for Petitioner.

APPENDIX

OPINION

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 15,582.

Joseph Mary Ebeling and Charles G. Emerling, Appellants.

vs.

United States of America, Appellee.

Appeal from the United States District Court for the Eastern District of Missouri.

[August 28, 1957.]

Michael J. Ebeling for Appellant Joseph Mary Ebeling.

Ted A. Bollinger, Jr., for Appellant Charles G. Emerling.

Forrest Boecker, Assistant United States Attorney, (Harry Richard, United States Attorney, with him on the brief) for Appellee.

Before JOHNSEN, VOGEL and VAN OOSTERHOUT, Circuit Judges.

JOHNSEN, Circuit Judge.

Ebeling and Emerling, the appellants here, were jointly charged, in an indictment of 9 counts, with 8 violations of 18 U.S.C.A. § 1001 and a violation of the conspiracy statute, 18 U.S.C.A. § 371. The indictment ran against them alone. On a trial to a jury, each was convicted on all 9 counts.

Section 1001, in its here material portion, makes guilty of a criminal offense anyone who, "in any matter within the jurisdiction of any department or agency of the United States, knowingly and willfully * * * makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry * * *".

Ebeling was manager of a business, operated under the trade name of Manchester Machine Co. Emerling was president of Production Engineering & Manufacturing Co., a manufacturing corporation. Both enterprises had their location in or near the city of St. Louis, Missouri

Production Engineering obtained a government contract in 1951, to produce mortar conversion kits for the Department of the Army. The contract contained a price redetermination clause, which required the filing of a statement of the costs involved in kits produced. And, under 50 App. U.S.C.A. § 1214, such a defense contract and any subcontract related thereto were automatically subject to a right of renegotiation on the part of the government, both against the prime contractor and against a subcontractor, for "the elimination of excess profits".

The exact amount of production which had occurred under the contract is not shown by the printed record, except that the bill of particulars filed by the government states that there had been paid to Production Engineering, on billings by it for kits produced, the sum of $602,608.56, and that the Army was claiming the right to have further credited on such billings the sum of $289,979.09, from overpayments made to Production Engineering on some other contracts. What production and billing there may have been beyond this does not appear, nor is the matter, or any of the other facts referred to in this paragraph, of moment here.

In 1952, while the contract was in force, Production Engineering purported to subcontract to Manchester Machine the doing of some machine work on a number of parts for the kit assemblies. It executed three purchase order forms in favor of Manchester Machine, ostensibly requesting performance by the latter of some code-numbered operations, on 1200 "adapters" at a price of $7776, on 1200 "housings" at a price of $9888, and on 2500 "strikers" at a price of $8050, respectively.

There is nothing to suggest that Manchester Machine ever had submitted any bid for the doing of this work or at the price set out in the purchase orders. The government's evidence showed, and entitled the jury to find, that the whole thing constituted a spurious affair, done for the purpose of defrauding the government; that the assembly-kit parts covered by the purchase orders were never sent out by Production Engineering to Manchester Machine for the doing of such machine work; that Manchester Machine never engaged in doing the work; but Manchester Machine, however, sent invoices to Production Engineering indicating that the work had been done and making charges therefor, in the amount of $20,298.24; and that Production Engineering made payment of these invoices and incorporated the fictitious charges contained therein in the statement of costs which it submitted to the Department of the Army.

Various incidental cover-up activities were also shown to have been engaged in, at the plants of both Production Engineering and Manchester Machine. Thus, the evidence entitled the jury to find that requisitions of material, together with shipping tickets, were falsely executed at the Production Engineering plant, in order to make it appear that adapters, housings and strikers had been duly sent out to Manchester Machine; that similarly shipping

tickets were falsely executed at the Manchester Machine plant, to make it appear that the finished parts had been sent back to Production Engineering; and, further, that inspection tickets were falsely executed at Production Engineering, to evidence receipt and inspection of the returned finished parts.

The conspiracy count set out the names of a number of employees at Production Engineering, as having joined in the conspiracy, in that they knowingly had helped to carry on some of the cover-up activities, but they were not indicted, since they apparently had only done what they as employees had been directed to do. Ebeling had not been quite so successful in getting cooperation from the employees of Manchester Machine, in the carrying out of his end of the fraudulent scheme. There was testimony showing that he had turned the three false purchase orders issued by Production Engineering over to one of his employees and directed that bills or invoices for charges be issued against the orders, but that the employee had refused to do so, stating that he knew that no such work had been done in the plant and that he did not want to have anything to do with the matter. The employee testified that Ebeling then tried to assure him that it was all right to make out the invoices against Production Engineering; that he had a "deal" with appellant Emerling; and that the employee did not need to be afraid of anything. When the employee still refused, Ebeling went into his private office and engaged in typing out the invoices himself. He also filled out some false shipping tickets, to indicate the return to Production Engineering of the fictitious finished parts.

As to tangible acts on the part of appellant Emerling, there was evidence from which the jury could properly find that it was he who had given the instructions at Pro-

duction Engineering for the issuance of the specious purchase orders in favor of Manchester Machine and he who had signed the checks for the payment of the specious invoices sent in by appellant Ebeling—with the papers being sent through the routine of the business for inclusion in Production Engineering's statement of costs to the government. Ebeling had admitted to one of the government's investigators that he and Emerling were personal friends of several years standing, having visited in each other's home and having taken a number of vacation trips together. There was testimony showing that during the period involved Ebeling came to the Production Engineering plant a number of times and always met with Emerling or Emerling's son—the latter being named, but not indicted, as a conspirator, and being used on the trial as a government witness. Such dealings and relations as necessarily underlay the situation were entitled to be found, on the circumstances shown, to have occurred entirely between appellant Ebeling and appellant Emerling directly, or with Emerling's son, when on occasion the father happened not to be present at the plant.

Each of the 8 substantive counts under 18 U.S.C.A. § 1001 related to the making and using of one of the 8 false invoices, by which Production Engineering was billed; on the basis of which Production Engineering issued its checks to Manchester Machine; and for whose amounts a charge was included in the statement of costs filed with the Department of the Army under the requirement of the contract.

As to each invoice, the applicable indictment count in substance alleged that it constituted a false writing within the purview of 18 U.S.C.A. § 1001; that all of its statements were false, fictitious and fraudulent; that both Ebeling and Emerling so knew; that Ebeling had fur-

nished the invoice to Emerling as a charge for purported work done under Production Engineering's government contract; that it was intended by Ebeling and Emerling that the charge therein should be, and it was, included from the invoice as a part of the costs listed in the statement presented by Production Engineering to the Department of the Army under the price redetermination clause of the contract and the government's renegotiation right; and that Ebeling and Emerling thus had made and used a false writing, knowing it to contain false, fictitious and fraudulent statements and entries, "in a matter within the jurisdiction of the Department of the Army, Ordnance, a Department and Agency of the United States", and so had violated 18 U.S.C.A. § 1001.

The conspiracy count alleged in substance that Ebeling and Emerling had conspired together (in which conspiracy certain named, but unindicted, employees of Production Engineering, and other persons whose names were declared to be to the grand jury unknown, had joined) to defraud the United States, by preparing, keeping and presenting false records and accounts of the costs of Production Engineering in performing its government contract, and particularly the costs of purported subcontracts on the part of Manchester Machine, to the end that Production Engineering's costs under the contract would be wrongfully increased.

In greater fullness, count 9 charged that Ebeling and Emerling, in conspiracy and confederation, had entered into an agreement or understanding, to cause purchase orders to be executed on Production Engineering's forms, to falsely indicate allotments of subcontract work by Production Engineering to Manchester Machine; to cause material requisitions to be executed, to falsely indicate the furnishing of mortar-kit parts to Manchester Machine for

the performing of such work; to cause shipping tickets to be executed, to falsely indicate that mortar-kit parts had been sent to Manchester Machine for purposes of such subcontract work; to cause inspection tickets to be prepared, to falsely indicate that finished parts from Manchester Machine had been returned to and checked by Production Engineering; and to cause false invoices to be prepared, making wrongful charges against Production Engineering for such purported subcontract work—which invoice charges Production Engineering was to include in its contract costs. Nineteen specific overt acts, in furtherance or accomplishment of the object of the conspiracy generally were set out, but it is not necessary to detail or discuss these here.

The principal contention urged for reversal is that, neither on the charges made nor on the facts proved as to counts 1 to 8, was it possible for appellants to be guilty of a violation of 18 U.S.C.A. § 1001, because it was not claimed or shown that the invoices themselves were presented to the Department of the Army. It is argued that a writing or document cannot be regarded as being within the jurisdiction of a department or agency of the United States, unless it has been physically presented to such department or agency for consideration, action or reliance, and that only on this basis can a crime exist under § 1001.

We do not believe that the term "jurisdiction", as related to the making or using of a false writing or document, is employed in this technical or limitative sense in the statute involved. Other courts have had occasion to consider the question and have held that § 1001 does not require that a false statement or document must itself have been presented to a department or agency of the United States but that it contemplates as well any knowing making or using of such a statement or document in

intended relationship to a matter that is within the jurisdiction of the department or agency. See e. g. *United States v. Myers*, D.C. Cal., 131 F. Supp. 525, 530; *United States v. Giarraputo*, D.C. N.Y., 140 F. Supp. 831, 834.

We agree. In more explicit terms, we are of the opinion that it constitutes a violation of § 1001, for anyone willfully to make or use a false writing or document, knowing that it contains a false, fictitious or fraudulent statement or entry, and intending that it shall bear a relation or purpose as to some matter which is within the jurisdiction of a department or agency of the United States, and with the false, fictitious or fraudulent statement or entry which it contains having a materiality on the department or agency matter. If the false writing or document constitutes a legally required record under a statute in some regulatory field, there may perhaps be an even broader liability under the section, but that aspect is not here involved and calls for no consideration.

United States v. Mellon, 2 Cir., 96 F. (2d) 462, *Terry v. United States*, 8 Cir., 131 F. (2d) 40, and *Lowe v. United States*, 5 Cir., 141 F. (2d) 1005, illustrates the application of the condition of intended relationship.

In the *Mellon* case, the defendant had applied to a local bank for a loan insured under the provisions of the National Housing Act, 12 U.S.C.A. § 1701 et seq., and had made some willfully false and material statements in the application executed by him. He was indicted and convicted under 18 U.S.C.A. § 80, of which § 1001 is the counterpart in the 1948 code revision. He contended, among other things, that no violation of the statute could exist, because the false statements had been made only to the bank and not to a government department or agency. The court, in affirming the conviction, said that "The statements were in fact made to obtain a loan insured

under the National Housing Act", and that "The application for such a loan was itself a matter within the jurisdiction of an agency of the United States". 96 F. (2d) at p. 463.

In the *Terry* case, the Court regarded the evidence in the particular situation presented as not sufficiently showing that the defendant, in making application to a local bank for a loan, was seeking to obtain one under the National Housing Act, or that the bank at the time could be said to have intended the loan to be of that nature, or that, if it did, it made known to the defendant that the dealings between them were upon that basis. Thus, the effect of the decision was that the evidence as appearing in the record did not establish a situation of intention that the false application should have relation to a matter within the jurisdiction of a department or agency of the United States. The opinion, however, must be read, we think, as implying that, if the evidence had been sufficient to show that "the statements were in fact made to obtain a loan under the National Housing Act," as in the *Mellon* case, supra, the conviction would not have been reversed.

In the *Lowe* case, the conviction of an employee was reversed, under a charge that he had violated 18 U.S.C.A. 80 by making a false statement to his employer, a private corporation, as to the number of hours that he had worked on a particular day—the corporation being at the time engaged in building ships for the United States Maritime Commission, an agency of the United States, under a contract calling for the employer to make payment to his employees of their wages but to have reimbursement made to it therefor by the Treasury of the United States.

The Court regarded the mere circumstance that the employer was entitled to reimbursement from the United

States as not of itself being sufficient to require that the employee's receipt of his wages and his statements in relation thereto be regarded as a matter that was within the jurisdiction of a department or agency of the United States. It said that the obligation for reimbursement "did not effect any change in the relationship existing between the company and private employee," and that, "Insofar as the employee was concerned, every aspect of his employment was exactly the same as it would have been had there been no contract with any government agency of any kind." 141 F. (2d) at p. 1006.

We read the opinion as implying that there was in that case no charge, or anything to show, that the employee knew that the work which he was doing, and the wages which he claimed, had been made the subject of an express contract provision between his employer and the government, constituting them a matter of direct charge and reimbursing obligation on the part of the United States; that the working time which he turned in thus necessarily would be a matter which was to be used against the government and as to which it accordingly had a right of audit and adjustment; and that in making the false statement with which he was charged, he had turned it in on this basis and with the intent that it was to be accepted and used in that relationship.

On the language and purpose of § 1001, we are unable to see any legal reason why an employee would not be guilty of an offense under the statute, if his work consisted in performing tasks under a defense, cost-plus contract between his employer and the government; if he had knowledge of the existence of the contract and of the fact that the work which he was doing was in performance of it; if he knew that the wages paid him were to be reimbursed as such to his employer by the government; and

if he willfully engaged in turning in a false, written statement of the hours worked by him, for the purpose of receiving wages not due him, and with the accompanying intent in these circumstances that the statement was to be accepted and used as a basis for the obtaining of reimbursement by his employer from the government, under the statutory power in a department or agency thereof to examine the legitimacy and correctness of the charges involved and with the right to rely upon the employee's statement as a component in the matter.

We can accordingly see nothing legally in the *Terry* and *Lowe* cases that helps appellants here, as they seem to believe. But beyond this, the factual situation in the present case is in any event not akin to those in the *Terry* and *Lowe cases*. Here, the matter of personal intent on the part of both Ebeling and Emerling to have the statements in the false invoices, which they had designed to have prepared, bear a relation to, by becoming a part of, the fraudulent cost statement which Emerling was to submit to the government, under the price redetermination clause of the contract and under the government's statutory renegotiation right, is not one of probative weakness, such as in the *Terry* and *Lowe* cases.

Further, the charges made under the purported subcontracts in favor of Manchester Machine were here directly linked to the statement of costs filed on behalf of Production Engineering, by 50 App. U.S.C.A. § 1214, in that under the statute the prices paid to a subcontractor were themselves made subject to examination and renegotiation as against the subcontractor himself. As matter of fact, the purchase orders which appellants engaged in using had stamped on their face, "This contract is subject to the Renegotiation Act of 1951 and is deemed to contain all provisions of Section 104 of that Act." Hence, the in-

voices which appellants caused to be prepared, as representing charges made for subcontract work, would of themselves be, on the language of 18 U.S.C.A. § 1001, "in a matter within the jurisdiction of a department or agency of the United States."

Each appellant has made some separate, technical arguments as to the insufficiency of the indictment and the evidence to sustain a conviction against him, both on the substantive counts and on the conspiracy count. Our reading of the record shows no merit in any of these contentions. They are of scattered-shot calibre and import only and call for no formal discussion.

The facts and circumstances shown by the record, and the inferences which reasonably could be drawn therefrom, amply entitled the jury to find that Ebeling and Emerling, in their personal friendship, had seized the opportunity, and come to an agreement or understanding, to use Production Engineering's mortar-kit contract to allow Manchester Machine to make charges and receive payments for fictitious subcontract work, and to cast the burden of these fraudulent charges and payments upon the government; that they were to, and did, carry out their fraudulent scheme by causing Production Engineering to issue spurious purchase orders to Manchester Machine and having various cover-up incidents, such as the issuing of false shipping tickets, etc., done at the two plants; that one of the things which they intended, and which Ebeling did on behalf of both of them, was the drawing up and submitting to Production Engineering of fictitious invoices or bills from Manchester Machine, for inclusion in the statement of production costs transmitted to the Department of the Army for pricing and payment purposes; that they thus both had engaged in a conspiracy to defraud the United States; and that, in having together knowingly caused

the several false invoices to be made and used, with the object of having the fictitious invoice work-charges carried into and made a part of the statement of production costs to be submitted for the government's consideration, they both also had been guilty of the several substantive offenses charged against them, of knowingly and willfully making and using a false writing or document, knowing it to contain a false, fictitious or fraudulent statement, and intending it to have a relationship or purpose in a matter within the jurisdiction of a department or agency of the United States.

In their joint scheme and intent to have the invoices made, they both were in law chargeable with a making of the writings, which they had so caused to be drawn up. And they both also had engaged in the alternate element of offense under the statute, of using the writings. The indictment charged them with a single offense, in having both made and used the writings. The evidence entitled the jury to find them guilty of having done both of these acts. The sufficiency of the evidence to sustain either of these elements or aspects of offense under § 1001 would, however, legally leave their conviction subject to affirmance.

The contention is made that the Court erred in receiving in evidence a sample of an adapter, a striker, a housing and an assembled kit, because the exhibits were not in the same condition as they would have been as raw parts, in relation to the time when the crime was alleged to have been committed. The physical objects, however, were not offered as having constituted instrumentalities in the commission of the crime, and the proof-of-same-condition rule upon which appellants rely, 2 Wharton Criminal Evidence, 11th ed., § 757, therefore has no application.

The trial Court could properly receive the exhibits, to enable the jury to understand what the terms "adapter", "striker", "housing" and "mortar conversion kit," as used in some of the document and testimony before it, had reference to 3 Wigmore on Evidence, 3rd ed., § 790. And the Court had the discretion further to allow the objects to be used demonstratively, by an exhibiting of them to the employees of Manchester Machine and Production Engineering, whom the government called as witnesses, in connection with their testimony that no such machining of parts, as had been charged for in the invoices, had ever been done at the Manchester Machine plant. This demonstrative use could, of course, beyond the matter of their negative identification by the witnesses, also cause the objects themselves to serve as circumstantial, corroborative evidence of the fact that the invoices constituted false writings.

We can see no force, on the record before us, in appellants' argument that, because the exhibits consisted of finished parts, upon which all the machining work had been done, they were not competent as a basis for the witnesses to make a negative identification, or for use otherwise as circumstantial evidence, in relation to whether Manchester Machine had done some intermediate work, in that it might have been possible that the witnesses could not identify the unfinished parts in their finally completed state. But, in any event, that question was controllingly one for the discretion of the trial Court, since the evidence was not within any legal rule of absolute exclusion. Much discretion as to the admitting of circumstantial evidence, especially where fraud is involved, must be allowed the trial Court, "and its ruling will be sustained if the testimony which is admitted tends even remotely to establish the ultimate fact." *Clune v. United States*, 159 U.S. 592,

593, 16 S.Ct. 125, 126, 40 L.Ed. 269; *Harper v. United States*, 8 Cir., 143 F. (2d) 795, 803.

Appellants' contention that the government was improperly allowed to impeach the testimony of one of its own witnesses is without any merit. The same is true of the contention of appellant Emerling that it was error to allow the use against him of the testimony of the employee of Manchester Machine, who had refused to prepare the false invoices for Ebeling, that Ebeling had stated that he and Emerling had a "deal" as to the making of the invoices. Establishedly, declarations of one member of a conspiracy, or of one of the joint members of some other unlawful undertaking, are admissible against members not present, where the declarations have been made for the purpose of furthering in any way the conspiracy or undertaking. 4 Wigmore on Evidence, 3rd ed., §§ 1079 and 1077; *Lutwak v. United States*, 344 U.S. 604, 617-618, 73 S.Ct. 481, 489, 97 L.Ed. 593; *Cwach v. United States*, 8 Cir., 212 F. (2d) 520, 525; *Lennon v. United States*, 8 Cir., 20 F. (2d) 490, 494. Here, appellant Ebeling made the declaration in question for the purpose of inducing the Manchester Machine employee to go ahead and prepare the fraudulent invoices, as something that both he and Emerling desired to have done and that represented one of the steps to be taken in the fraudulent scheme. This was, of course, only an added element in the government's substantial proof of Emerling's participation, which has been set out above.

Appellants' final contention is that the Court's instructions were erroneous, because they required the jury to return a joint verdict only, of guilt or innocence, on each of the eight substantive counts, and thus deprived them of the benefit of the provision of Rule 31(b) of the Federal Rules of Criminal Procedure, 18 U.S.C.A., that "If there are two or more defendants, the jury at any time during

its deliberations may return a verdict or verdicts with respect to a defendant or defendants as to whom it has agreed * * *."

The Court's charge called the jury's attention to the fact that the substantive counts had charged that appellants jointly had done the acts involved and stated that it therefore was not sufficient as a basis for a conviction against them that one of them may have known that the invoice involved was a false writing, but that the jury had to find, before it could convict, that "the knowledge of falsity and intent as to use in a matter within the jurisdiction of the Department of the Army, Ordnance, be known and intended by both defendants."

The Court went on to emphasize, however, that there could be no conviction of both of them on the knowledge or intent simply of one of them alone, but that "you must find the defendants each knowingly and intentionally caused the invoices referred to * * * to be made, and thereafter * * * knowingly and intentionally caused the invoice to be used as an item of cost in executing the prime contract * * * with knowledge of its falsity, and knowingly and intentionally caused the invoice to be used as a sum going to make up the total sum presented to the Army * * * and that they intended and knew it was included in the figures presented to the government's agent * * *."

This, in its effect, required the jury to find that each one of them individually was guilty of all the elements of the crime, before there was a right to convict, but on the basis of the other instruction prohibited the returning of any verdict whatever of conviction, even though one of them might have been proved to be so guilty, unless the jury found that the other also had been proved to be so guilty. In other words, while neither defendant, of course, could

be convicted on the other's guilt, each was given the advantage by the instructions of being made subject to acquittal on the other's innocence.

The according of this improper benefit, in opportunity for acquittal, could hardly be claimed by either appellant to be a prejudicial error against him. Error favorable to an appellant does not constitute a basis for reversal in a criminal case. *Stevens v. United States*, 6 Cir., 206 F. (2d) 64, 66; Rule 52(a) Federal Rules of Criminal Procedure, 18 U.S.C.A.

Appellants have been convicted of proper indictment charges, on a fair trial, under process which is free from prejudicial error, and with a result that the record persuades is just. There is no basis for either of them to ask reversal.

Affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

JUDGMENT

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

September Term, 1956
Wednesday, August 28, 1957

Joseph Mary Ebeling and Charles G. Emerling, Appellants,
vs.
United States of America, Appellee.
No. 15582

Appeal from the United States District Court
for the Eastern District of Missouri

This cause came on to be heard on the record from the United States District Court for the Eastern District of Missouri, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the judgments and sentences of the said District Court in this cause be, and the same are hereby, affirmed.

And it is further Ordered and Adjudged by this Court that the defendants in the said District Court, Joseph Mary Ebeling and Charles G. Emerling, do surrender themselves to the custody of the United States Marshal for the Eastern District of Missouri, if not now in custody, in execution of the judgments and sentences imposed upon them, within thirty days from and after the date of filing of the mandate of this Court in the said District Court.

August 28, 1957.

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SUPREME COURT, U.S.

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JOHN T. FEY, Clerk

No. 596

In the Supreme Court of the United States

OCTOBER TERM, 1957

CHARLES G. EMERLING, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. 13) has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on August 28, 1957. A petition for rehearing was denied on October 3, 1957. The petition for a writ of certiorari was filed on November 2, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether invoices passing from a subcontractor to a prime contractor in the circumstances of

case—where the prime contractor was under contract with the Government, and where both the subcontractor and the prime contractor knew that the invoices would be subject to Government scrutiny—were documents within the jurisdiction of a department or agency of the United States within the purview of 18 U. S. C. 1001.

2. Whether the trial court erred in its instructions to the jury.

STATUTE INVOLVED

18 U. S. C. 1001 provides:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

STATEMENT

Petitioner and Joseph Mary Ebeling were convicted in the United States District Court for the Eastern District of Missouri of (a) willfully making and using fal documents in a matter within the jurisdiction of a department of the United States in violation of 18 U. S. C. 1001 and (b) conspiracy to do so. Petitioner was sentenced to imprisonment for 12 months on each of eight substantive counts to run concurrently and fined $2,500 on the conspiracy count.

Charles Emerling, petitioner, was president of the Production Engineering and Manufacturing Co. (hereinafter referred to as "PEMCO"), and Joseph Mary Ebeling was manager of the Manchester Machine Co.

In May of 1951, PEMCO contracted with the Department of the Army Ordnance to produce mortar conversion kits (R. 20–21). The contract contained a price redetermination clause which required PEMCO to file with the Department of the Army a statement of its costs to produce the mortar conversion kits (R. 21).

In April of 1952, PEMCO executed three purchase orders to the Manchester Co. suggesting certain machine shop operations on "adapters," "housings," and "strikers" to be done for a total of $25,714 (R. 33–34). Ebeling, manager of the Manchester Co., then instructed one of his subordinates to prepare invoices indicating that the work ordered by PEMCO had been performed by the Manchester Co. (R. 60–62). The work, however, had not been done (R. 40, 55, 56, 65), and the subordinate, realizing this, refused to execute the invoices. Finally, after stating that "he had some deal with Charley Emerling", Ebeling made out the invoices himself (R. 61, 62).

The invoices were then presented to PEMCO, shipping tickets were made indicating that the adapters had been shipped from the Manchester Co. back to PEMCO, and the Manchester Co. received payment for this fictitious work by checks from PEMCO signed by petitioner.

In 1952 PEMCO caused a statement of the costs of production of the mortar conversion kits to be

prepared by certified public accountants (R. 58). These totals were incorporated in a statement of costs signed by Carl Emerling, executive vice-president of PEMCO and son of petitioner, and submitted to the Department of the Army, St. Louis Ordnance District on January 16, 1956 (R. 21, 47, 59).

Petitioner's conviction was unanimously affirmed by the Court of Appeals (Pet. App. 13).

ARGUMENT

1. Petitioner argues (Pet. 9, 10) that a document cannot be regarded as being within the jurisdiction of a department or agency of the United States under 18 U. S. C. 1001 when it passes from one individual to another and later becomes incorporated in another document which is presented by a third person to the governmental agency. Section 1001 does not, however, require that a false statement or document must itself have been presented to a department or agency of the United States. *United States* v. *Myers*, 131 F. Supp. 525 (N. D. Cal.). The only requirement is that the statement be made in a matter that is within the jurisdiction of such department or agency. This requirement has been construed to encompass any statement or document that was intended to be used in a matter within the jurisdiction of a department or agency of the United States. See *United States* v. *Leviton*, 193 F. 2d 848, 851 (C. A. 2), certiorari denied, 343 U. S. 946; *Nye & Nissen* v. *United States*, 168 F. 2d 846, 850-851 (C. A. 9), affirmed on other grounds, 336 U. S. 613; *United States* v. *White*, 69

F. Supp. 562, 564–565 (S. D. Cal.); *United States* v. *Myers*, 131 F. Supp. 525, 530 (N. D. Cal.); *United States* v. *Giarraputo*, 140 F. Supp. 831, 833, 834 (E. D. N. Y.); *United States* v. *Ganz*, 48 F. Supp. 323, 325 (D. Mass.).

In *United States* v. *Mellon*, 96 F. 2d 462 (C. A. 2), certiorari denied, 304 U. S. 586, a false application made to a local bank for a loan insured under the National Housing Act was held to be within the purview of 18 U. S. C. 1001, since the statements were in fact made to obtain a loan insured under the National Housing Act.[1] In the present case, petitioner was aware of the fact that his contract with the Government required the filing of a cost statement. Under instructions from the court, the jury was required to find that petitioner knew the invoices from the Manchester Co. were false, and they were also required to find that petitioner intended these false invoices to be incorporated in the cost statement to the Department of the Army. Thus the invoices did bear a relation to, by becoming a part of, the fraudulent cost statement which petitioner submitted; and because the invoices were false, they impaired the value of that cost statement, in violation of 18 U. S. C. 1001.

The case of *Lowe* v. *United States*, 141 F. 2d 1005 (C. A. 5), is not in point. In that case, the de-

[1] In *Terry* v. *United States*, 131 F. 2d 40 (C. A. 8), the defendant, in making his application to the local bank, did not do so with the intent of obtaining a loan under the National Housing Act and the bank was not dealing with the defendant upon that basis.

fendant presented a false claim to the payroll department of his employer, a private company. The company's contract with the Government provided that the company should be reimbursed from the United States Treasury for such payments. The court stated that merely because the employer was entitled to reimbursement was not sufficient to label an employee's payroll statements as a matter within the jurisdiction of a department or agency of the United States. There was, stressed the court, nothing to indicate to the employee the relationship that existed between his employer and the United States Government.

The case at hand is much different. Here the petitioner knew very well that his costs of manufacturing were subject to the scrutiny of the United States Government. Thus there is present in this case that which was lacking in order to prosecute successfully in the *Lowe* case—knowledge that the false statement was to be used in a matter within the jurisdiction of a department or agency of the United States.

2. The District Court charged:

"Before you can find the defendants guilty on either of the first eight counts of the indictment you must find the defendants, each knowingly and intentionally caused the invoice * * * to be made, and thereafter the defendant knowingly and intentionally caused the invoice to be used as an item of cost in executing the prime contract * * * with knowledge of its falsity, and knowingly and intentionally caused the invoice to be used as a sum going to make up the

total sum presented to the Army Ordnance * * * and that they intended and knew it was included in the figures presented to the government * * * *" (R. 97).

Petitioner contends (Pet. 8–9) that this instruction was erroneous in that it required the returning of a joint verdict only and thus deprived petitioner of the benefits of Rule 31 (b) of the Federal Rules of Criminal Procedure. The court further charged that "you must find the defendants, each knowingly and intentionally caused the invoice * * * to be made;" and "[t]hat defendant Ebeling or Emerling, separately, may have known an invoice to be a false writing is not enough to convict; it is necessary that you find the knowledge of falsity and intent as to use in a matter within the jurisdiction of the Department of the Army, Ordnance, be known and intended by both defendants, before you can convict on either of the first eight counts of the indictment" (R. 97). It is submitted that there was no prejudicial error in the charge as a whole.

If the charge cannot be interpreted as requiring separate verdicts, the only other interpretation can be that it required a finding of guilty against both defendants before either could be convicted. In order to convict both, the jury was required to find that each one individually was guilty of the crime; but they were prohibited from returning a verdict of guilty against either if one was found innocent. This placed a greater burden upon the prosecution. If anything, the petitioner was favored by such a charge.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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DECEMBER 1957.

U. S. GOVERNMENT PRINTING OFFICE 1957